

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 08-13555 (JMP); 08-01420 (JMP) (SIPA)

In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.

Debtors.

In the Matter of:

LEHMAN BROTHERS INC.

Debtor.

United States Bank

1000 2000 3000 4000 5000 6000 7000 8000 9000 10000

May 7, 2010

9:17 AM

B E F O R E;

HON. JAMES M. PECK

U. S. BANKRUPTCY JUDGE

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2 CONTINUED EVIDENTIARY HEARING re 60(b) Motions

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Transcribed by: Lisa Bar-Leib

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P R O C E E D I N G S

2

THE COURT: Be seated. Good morning. Be seated,
3 please.

4

MR. BOIES: Good morning, Your Honor.

5

THE COURT: Good morning, Mr. Boies.

6

RESUME CROSS-EXAMINATION

7

BY MR. BOIES:

8

Q. Good morning, Mr. Burian.

9

A. Good morning, Mr. Boies.

10

Q. Yesterday you testified about a conversation that you had
11 early Monday morning with Mr. Miller and Mr. Klein and perhaps
12 some other people. Do you recall that?

13

A. I do.

14

Q. How long did that conversation last?

15

A. Seven to eighteen minutes.

16

Q. Say that again.

17

A. Eighteen minutes.

18

Q. Eighteen minutes?

19

A. Around there somewhere.

20

Q. Were you timing it?

21

A. I was giving you a range. I mean, around fifteen minutes.

22

Q. Around eighteen minutes? And who else was present other
23 than Mr. Miller and Mr. Klein?

24

A. Tom Roberts was there, Mr. Miller's partner, Mike Fazio,
25 my partner, Lori Fife, I believe, for a period of the -- for a

1 period of it.

2 Q. Did Mr. Fazio take any notes?

3 A. I don't believe so. We searched for notes. If it wasn't
4 provided to you, then no.

5 Q. Did you take any notes other than writing the little thing
6 on resis that you wrote on the mon --

7 A. No. I was listening and watching Mr. Klein write it out
8 for me.

9 Q. Did you prepare any memo of what you say Mr. Klein told
10 you?

11 A. I did.

12 Q. And to whom did you send that memo?

13 A. It's a memo I discussed earlier which I sent to the
14 committee which was ninety-nine percent from Mr. Klein's
15 conversation.

16 Q. And did you mention that that was based on something that
17 you had heard from Mr. Klein?

18 A. In the memo to the committee?

19 Q. Yes.

20 A. No.

21 Q. Did you prepare any writing in which you ascribed Mr.
22 Klein what you testified to the Court Mr. Klein said?

23 A. I have no writing that said Mr. Klein said.

24 Q. In this memo that you say that you wrote to the committee,
25 did you even mention that you had a conversation with Mr.

1 Klein?

2 A. In the memo I didn't write or the memo I did write?

3 Q. The memo you did write.

4 A. Well, you saw the memo. It doesn't mention Mr. Klein by
5 name.

6 Q. No. And does that memo that you say you wrote to the
7 committee even mention that you had had any conversations with
8 anyone at Barclays?

9 A. Why don't we go back and look to see -- I think I said
10 discussions or something like that with the parties. I'm not
11 sure if I said Lehman or Barclays. I'm not sure.

12 Q. And which memo, just so the record is clear, are you
13 talking about? What was the date of the memo?

14 A. Monday morning when I got back to the office. So it
15 was -- what date was Monday morning again? The 20 --

16 Q. That would have been the 22nd.

17 A. The 22nd.

18 Q. Let me try to , with your counsel's help, find the memos
19 because I want to be sure that we've identified exactly what
20 memo you're talking about. Would you turn to Movants' Exhibit
21 713?

22 A. So, Mr. Boies, did you see, I did not mention Lehman or
23 Barclays. I said, "Following participating discussions and
24 explanations regarding the open issues".

25 Q. And so, there's no mention of Lehman or Barclays, you say,

1 in this?

2 A. I do not specifically reference the source of my
3 information in this memo other than --

4 Q. Well, let's take a look at that, sir. Let's look at
5 paragraph 3, okay?

6 A. Oh.

7 Q. How do you begin paragraph 3?

8 A. Oh. "According to Lehman, there's no five billion dollar
9 issues."

10 Q. Now, is there anywhere in this memo that you ascribe
11 anything to Barclays?

12 A. As I mentioned earlier, I don't believe I referenced
13 Barclays specifically anywhere in this memo.

14 Q. Now, in any of the materials that you ever prepared for
15 the committee, did you ever reference anything that Barclays
16 told you ascribing it to Barclays at the time?

17 A. I don't specifically recall any such memo.

18 Q. Okay. Now, you said that during this conversation, Mr.
19 Klein told you, in effect, that Barclays was going to take a
20 two billion dollar loss on this transaction. Do you recall
21 that?

22 A. No.

23 Q. Well, do you recall him, according to you, telling you
24 that they were going to get 47.4 in assets?

25 A. That sounds right, yes.

1 Q. And much in liabilities did he tell you, according to you,
2 that Barclays was going to assume?

3 A. The cure, the comp for giving of the Barclays repo. The
4 reason I say no earlier was because the transaction had other
5 elements besides this piece. I was trying to be clear. Buy --
6 as you know, we thought buying the broker/dealer was a great
7 deal. If we're talking about did he tell me that Barclays was
8 doing worse than expected in respect of the purchase of the
9 broker dealer assets, then my answer will be yes.

10 A. Let me be sure I understand what you're saying. Do you
11 recall yesterday saying that Mr. Klein told you that they were
12 going to take assets of forty-seven or 47.4 and they were going
13 to assume liabilities that were over forty-nine billion
14 dollars?

15 A. Forty-five and two is forty-seven and forty-nine -- yes,
16 sir.

17 Q. Okay. And so that means that what Mr. Klein told you was
18 that they were going -- according to you, was that Barclays was
19 going to take on a couple billion dollars more in liabilities,
20 at least in terms of anything he talked to you about, than they
21 were getting assets, right?

22 A. In respect of the broker/dealer assets as compared to the
23 change from Wednesday to the closing Monday morning, Mr. Klein
24 said that Barclays was actually going to do almost two billion
25 dollars worse than expected. Keeping in mind --

1 Q. Two dollars --

2 A. I'm trying to give you a full answer, Mr. Boies, to make
3 this -- help it go quicker. Keep in mind that some of that --

4 Q. It'll actually go quicker if you respond to my questions.

5 A. -- some of this included --

6 Q. Do you know what question you're responding to?

7 A. I do.

8 Q. What is the question?

9 A. Whether or not Mr. Klein told me that they were expecting
10 to take a two billion dollar loss --

11 Q. No.

12 A. -- on the assets --

13 Q. No.

14 A. -- being purchased in the broker/dealer.

15 Q. No. The question was whether, according to you, Mr.
16 Klein, in this conversation, told you that they were taking on
17 approximately two billion dollars more of liabilities than they
18 were getting assets. Did he tell you that? That's a yes or no
19 question, to begin with, or I don't know. And then you can
20 give an explanation if you feel it's necessary. Did he tell
21 you that?

22 A. Yes, with an explanation.

23 Q. Okay.

24 THE COURT: Do you want him to give the explanation?

25 Q. How long is the explanation?

1 A. I think pretty short.

2 Q. Okay. Then please do.

3 THE COURT: Let's have a short explanation.

4 THE WITNESS: 4.25 of those liabilities were estimates
5 of cure and comp. So when you add them up, those may or may
6 not be full liabilities. Some of them were at the discretion
7 of Barclays. So whether or not Barclays was, in fact, taking a
8 loss as opposed to coming out even, that was not explicit.
9 Whether or not, in a purchase of the broker/dealer assets,
10 Barclays was doing two billion dollars, roughly, worse than
11 they expected when we were standing in court by Wednesday and
12 Friday, that was clear.

13 Q. Did Mr. Klein tell you in this conversation that the 4.25
14 billion of cure and comp might or may not be paid?

15 A. That did not come up in the conversation.

16 Q. Was that something that you believed at the time of the
17 conversation?

18 A. Yes, with an explanation.

19 Q. How long is the explanation?

20 A. Short.

21 Q. Please give it to us.

22 A. With respect to the comp, we were understood the comp was
23 being paid in full and was part of the books and records of
24 Lehman unchanged based on how the broker/dealer accrued their
25 compensation. With respect --

1 Q. Who told you that?

2 A. With respect to --

3 Q. Who told you that?

4 A. Can I finish my answer, sir?

5 Q. Can I just ask who told you that?

6 A. I'll remember that and I'll respond to it when I finish my
7 answer.

8 Q. Sir, I'm letting you give an explanation. I think you've
9 given a short explanation. I'd like to know just who told you
10 that.

11 THE COURT: Mr. Boies, here's what we're going to do.
12 You can remember that question. He can remember that answer.

13 MR. BOIES: Okay.

14 THE COURT: But if the witness is in the midst of an
15 explanation --

16 MR. BOIES: Okay.

17 THE COURT: -- he's entitled to finish it without
18 being interrupted.

19 MR. BOIES: Yes, Your Honor.

20 A. With respect to the cure, we knew there was a level of
21 discretion.

22 Q. Who told you that?

23 A. With respect to the comp at the Thursday meeting at Weil
24 Gotshal --

25 Q. Sir, my questions is who told you that.

1 A. I am -- Lehman and its counsel.

2 Q. What?

3 A. Lehman and its counsel.

4 Q. Okay. Now, with respect to the comp, who told you what
5 you related?

6 A. I just answered that.

7 Q. With respect to the cure, who told you what you related?

8 A. I read the contract.

9 Q. Okay. Other than reading the contract, did anybody tell
10 you what you've related?

11 A. I have no specific recollection.

12 Q. When you said you read the contract, what contract are you
13 referring to?

14 A. The asset purchase agreement.

15 Q. Did you also read the clarification letter?

16 A. Yes.

17 Q. When did you read the asset purchase agreement for the
18 first time?

19 A. If you're talking about the version that was filed with
20 the Court upon the filing or shortly after the filing of the
21 bankruptcy case, I read that, I think, Tuesday night or
22 Wednesday morning.

23 Q. When did you first read the clarification letter?

24 A. Do you mean the signed version? Probably sometime on
25 Monday or Tuesday after the closing.

1 Q. September 22nd or 23rd, is that correct?

2 A. If that's Monday or Tuesday, yes.

3 Q. Okay. When did you first become aware that Barclays
4 planned to book a gain on the acquisition of the Lehman assets?

5 A. I first became aware that Barclays was going to book --
6 was planning to book an accounting gain, if that's what you
7 mean, on Saturday night after the Friday hearing.

8 Q. In other words, the 20th of September?

9 A. Okay.

10 Q. And how did you become aware of that?

11 A. I think when I got to Weil Gotshal, someone showed me the
12 press release that Barclays had issued or it could have been
13 the transcript of the analyst report or Q&A from -- I don't
14 remember if it was Thursday or Friday.

15 Q. Let me ask you to look at tab 1 in your book, which is
16 Barclays' Exhibit 109A. This is a September 17, 2008 press
17 release. Is this the press release that someone showed you on
18 Saturday, September 20?

19 A. As I mentioned earlier, I don't remember if I saw the
20 press release or the analyst Q&A, but I'll take your word for
21 it that this is the press release that was issued in connection
22 with the Barclays purchase agreement.

23 (Pause)

24 A. Reading it quickly, it does look consistent with that.

25 Q. It does not look consistent with what you saw.

1 A. It does. It does.

2 Q. Oh, it does look consistent with what you saw.

3 A. Yeah.

4 Q. On Saturday. Is that what you're saying?

5 A. Either what I saw or was told about or read in the Q&A.

6 Q. Now, let me ask you to look at tab 2 which is Barclays'
7 Exhibit 110. And did you see this document on Saturday,
8 September 20?

9 A. I believe I did. This looks much more familiar.

10 Q. And did you read it?

11 A. Not the whole thing but, yes, I read portions.

12 Q. What portions did you read?

13 A. Mr. Boies, I don't remember exactly. Whichever portion
14 related to the purchase of the broker/dealer securities.

15 Q. Well, let me direct your attention to some portions. Let
16 me go to the second page, the third paragraph.

17 A. Are we in the press release or in the Q&A?

18 Q. Exhibit 110, Barclays' Exhibit 110 that's behind tab 2.
19 Do you have that, sir?

20 A. Yes, thank you.

21 Q. And you say you saw this document on Saturday, September
22 20, correct?

23 A. Correct.

24 Q. And directing your attention to second page, third
25 paragraph, second sentence, it says: "We are acquiring trading

1 assets with a current estimated value of seventy-two billion
2 dollars and trading liabilities with a current estimated value
3 of sixty-eight billion dollars for a cash consideration of 250
4 million dollars." Did you read that portion on Saturday,
5 September 20?

6 A. I believe I did.

7 Q. All right. Going down two paragraphs, again to the second
8 sentence, where Barclays says, "In fact, the transaction is
9 capital/ratio accretive without additional equity issuance.
10 And the source of that accretion is the negative goodwill from
11 the transaction which amounts to about two billion U.S. dollars
12 after tax -- or post tax." Do you see that?

13 A. I do.

14 Q. And did you read that portion?

15 A. I did.

16 Q. And going on to page 5, at the top there's a question
17 where the questioner says "You have a buffer between the
18 trading assets and liabilities of four billion dollars?" And
19 then the answer from Barclays says: "We absolutely expect to
20 preserve that buffer. And the way that Chris has described, we
21 have marked. And the capital derived from the negative
22 goodwill that arises from the transaction is actually more than
23 is needed to support the fifteen billion dollars of risk-
24 weighted assets. It is just the combination of that part of
25 the transaction gives them an enhancement to the tier one

1 capital and equity tier one capital." Did you read that
2 portion on Saturday, September 20?

3 A. I don't have a specific recollection. But I knew this
4 information if that's your point.

5 Q. I'm sorry. Say again.

6 A. I don't have a specific recollection of reading these
7 exact words. But I do remember this information being related
8 to me. I believe I read it. I just can't -- I try to be very
9 clear about what I'm absolutely certain about and what I
10 believe I did.

11 Q. And when you say this information was related to you, you
12 mean it was related to you on Saturday, September 20th?

13 A. Mr. Boies, on Saturday, I knew this information either
14 because I read it or because it was related to me. If I had to
15 guess, I think I read it.

16 Q. Okay. Now, when Barclays said that it was going to have
17 two billion dollars of negative goodwill on day 1 of the
18 transaction, did you have an understanding of where that
19 negative goodwill was going to come from?

20 MR. KIRPALANI: Objection, Your Honor. No foundation
21 that this witness understands even accounting concepts.

22 THE COURT: Did he have an understanding of where this
23 negative goodwill would come from?

24 MR. KIRPALANI: Correct.

25 THE COURT: I overrule that objection. I think that

1 he either has an understanding or doesn't have an
2 understanding. If he has an understanding, Mr. Boies, no
3 doubt, will probe all the background facts as to how he has
4 that understanding. So I think right now, it's a yes or no
5 question.

6 MR. BOIES: It is, Your Honor.

7 A. No, with an explanation. I had a guess but I do not know.

8 Q. How long would it take you to tell me your guess?

9 THE COURT: Well, this isn't a timed trial. So it
10 really doesn't matter how long it takes him --

11 MR. BOIES: Okay. Well, the only thing is, Your
12 Honor --

13 THE COURT: -- if you want the answer.

14 MR. BOIES: The only thing is, Your Honor --

15 Q. Well, why don't you give us the answer?

16 A. From this Q&A, it was very clear that consistent with what
17 was described to the Court, Barclays was paying -- was buying
18 sixty-eight -- seventy-two billion of assets and paying sixty-
19 eight. And the difference was an assumption of all sorts of
20 liabilities in the estate. I assume that based on some British
21 accounting methodology, that when you book trading assets for a
22 capital accretion, you look at your book. And you look at what
23 you have in your book. And you don't look at compensation and
24 cure and contracts in the same buckets. And therefore, I
25 assumed that there was going to be a capital accretive gain on

1 Barclays' trading book as was described. What I couldn't
2 figure out and had no idea of knowing was, why it was two
3 billion, not three billion or four billion.

4 Q. Did you ever try to find that out?

5 A. No.

6 (Pause)

7 A. Oh --

8 Q. Did you ever --

9 A. Excuse me, sir. In what time frame? I want to -- I
10 apologize. I did try to find it out. Not that night.

11 Q. When did you first try to find out how the -- or why
12 Barclays was booking or said it was booking a gain on
13 acquisition?

14 A. When your counsel made a big deal of it in my deposition.

15 Q. And when was that, sir?

16 A. I don't remember the exact date of my first deposition.
17 But thereafter --

18 Q. But it was in this case, this proceeding.

19 A. This case.

20 Q. It was sometime in 2009, late 2009, is that correct?

21 A. Whenever my first deposition was. Counsel can help me out
22 here.

23 Q. Well, if you turn to the book that your counsel gave you,
24 and turn to the tab that is helpfully labeled "Transcript", do
25 you see when your first deposition was?

1 A. December 17, 2009.

2 Q. And that was the first time, according to you, that you
3 made any effort to find out what the basis of Barclays'
4 announced gain was, is that correct?

5 A. Yeah, more or less.

6 Q. When you say "more or less", did you make any effort prior
7 to December of 2009 to ascertain what the basis of Barclays'
8 announced gain on acquisition was with respect to this
9 transaction?

10 A. When was the Barclays brief filed in this case? Was that
11 before or after my deposition? Where Barclays provided an
12 explanation of the accounting gain and said there was no gain.
13 When was that? Was that before December or after? It was in
14 paragraph 44 of the brief.

15 Q. I'm sorry. Say again.

16 A. I think it was paragraph 44 of the brief.

17 Q. Paragraph 44 of the brief.

18 A. Was that before or after my deposition?

19 THE COURT: That's a shocking display of memory, Mr.
20 Burian. It will ultimately be to your detriment.

21 THE WITNESS: The only reason I remember, Your Honor,
22 is 44 was my number in high school. Favorite number.

23 THE COURT: All right.

24 A. When was that brief filed? 'Cause if it --

25 Q. Is it your testimony that either at your deposition or

1 when this paragraph 44 was filed, that was the first time that
2 you made any effort to figure out what the basis was for
3 Barclays' announced gain on acquisition in connection with this
4 transaction?

5 A. Yes. It was the first time I made any serious effort.

6 Q. Now you said "serious effort".

7 A. Yes. It's the first time I cared -- I thought the issue
8 was relevant enough to focus on seriously.

9 Q. When you say "focus on seriously", I want to understand
10 when the first time was that you made any effort to find out
11 what the basis was of Barclays' announced gain. And then I'll
12 probe what you did and we'll figure out whether it's serious or
13 not. But I want to know what the first time you made any
14 effort, any effort at all, to figure out what that basis was.

15 A. The reason I'm being careful is when I got this, if
16 someone said to me, hey, what do you think, where is this from
17 or what's going on, probably -- I don't have any specific
18 recollection of saying I need to investigate or look at this
19 press release and understand Barclays' accounting treatment
20 until it became an issue in this trial. At the time, it was
21 not something that I looked into or took seriously.

22 Q. Well --

23 A. That's -- I'm just trying to be complete.

24 Q. Well, in September of 2008, did somebody come to you and
25 say Barclays is announcing this two billion dollar gain. How

1 do you think they're doing that?

2 A. I believe that one or two committee members or other
3 counsel forwarded the press release and said, hey, look,
4 they're booking an accounting gain. As I said to you, they
5 came to my attention and I read the document.

6 Q. No. I understand -- I understand the gain came to your
7 attention. My question is different. My question is whether
8 anybody from the committee, or anyplace else, came to you
9 during September 2008 and asked you whether you had any
10 explanation for how Barclays was announcing what has been
11 referred to repeatedly as this one day or immediate gain on
12 acquisition.

13 A. I don't remember any specific conversation where that was
14 a material issue.

15 Q. Well, I'm not asking whether it was a material issue or
16 not, sir. I'm asking whether there was any conversation at
17 all, whether you thought it was a material issue or not.

18 A. Mr. Boise, I am sure that whether it was at the October
19 8th committee meeting or during conversations in the hallway
20 around the closing that there was, hey, look, Barclays is
21 booking a gain. I'm sure that there was -- I knew about it. I
22 read it. It was discussed with committee members from time to
23 time. I'm -- then you're going to ask me what date. I don't
24 know of any particular date. It wasn't an important issue in
25 what I was doing.

1 Q. When you say it was discussed among committee members, do
2 you mean discussed among committee members in September of
3 2008?

4 A. I don't have a specific recollection of exactly when or
5 where this particular press release of Barclays' accounting
6 treatment was discussed. I remember getting e-mails from
7 people forwarding it to me. I remember reading it. I am sure
8 it came up in conversations about, wow, we need to go look at
9 this and get a reconciliation. It just wasn't something
10 important that I recollect specifically trying to figure out
11 how Barclays was dealing with their accounting or particular
12 conversations with people about this press release.

13 Q. When was the first time that you can tell us as the
14 committee's 30(b)(6) witness that anybody in the committee said
15 we need to look at this gain and figure it out?

16 A. There were many conversations in which we said we need to
17 look into whether or not Barclays got a gain. Never was this
18 press release something that was divorced from that process.
19 There was no connection in my mind or anyone else's on
20 Houlihan's side that this gain was specific -- that the
21 accounting gain directly correlated to an economic gain.

22 So you're asking me the first time. I don't want to say
23 there never was or no, 'cause we talked about it. Hey, did
24 Barclays get a gain? Wait, we have to reconcile. We pushed --
25 wow, we did all that stuff. So later you can come back and I'm

1 worried you're going to say, well, wasn't that part of the
2 accounting gain. On the other hand, was there a specific I
3 need an explanation of this press release and this accounting
4 gain? That was never an important issue.

5 Q. My question, sir, was when. I understand you've testified
6 these conversations happened. My question is when did they
7 happen. When was the first time that anyone from the committee
8 said, in words or in substance, Barclays has announced a two
9 billion dollar after tax accounting gain. We ought to figure
10 out what the basis of that gain is. When did somebody say
11 that, in words or in substance, for the first time?

12 A. As I said to you, I don't have a specific recollection of
13 the first time.

14 Q. Approximately?

15 A. I received this press release from a number of sources and
16 wouldn't be surprised if someone said look into this. I don't
17 have a specific recollection. And I'm not going to make it up
18 to you.

19 Q. No one's asking you to make up testimony, sir. What I am
20 asking you as the committee's 30(b)(6) witness --

21 A. I think I'm Houlihan's 30(b)(6) witness.

22 Q. What?

23 A. I think I'm Houlihan's witness not the committee's.

24 Q. Okay. Houlihan is the professionals for the committee,
25 right?

1 A. A professional for the committee, yes.

2 Q. And as Houlihan's 30(b)(6) witness, when was the first
3 time -- and if you don't remember specifically, just tell me
4 approximately when the first time was that, to Houlihan's
5 knowledge, anybody from the committee or representing the
6 committee said, in words or in substance, there's this two
7 billion dollar gain that Barclays is announcing. We ought to
8 figure out what the basis of that announcement is.

9 A. I don't remember.

10 Q. Approximately?

11 A. I don't remember.

12 Q. Was it in 2008?

13 A. I don't remember.

14 Q. Was it before June of 2009?

15 A. I don't remember.

16 Q. Now, you said that there were discussions about whether
17 Barclays had what you referred to as an economic gain. Recall
18 that?

19 A. I do.

20 Q. First, what did you mean by an "economic gain"?

21 A. As compared to an accounting gain. In a distinction to an
22 accounting gain.

23 Q. And, sir, what is that distinction?

24 A. Whether you actually make money. Whether it is something
25 that is real as opposed to bookkeeping.

1 Q. And when did the committee, insofar as anyone at Houlihan
2 knows, first attempt to determine whether Barclays had what you
3 referred to as an economic gain?

4 A. On the first second we got involved in the Barclays sale.

5 Q. Excuse me?

6 A. On the first second we got retained.

7 Q. That is, before the closing of this transaction, correct?

8 A. Yes, sir.

9 Q. And at the time the transaction closed, had you given any
10 advice to the committee as to whether or not, in your opinion,
11 Barclays would or would not have what you referred to as an
12 economic gain?

13 A. I did.

14 Q. And by economic gain, are you taking into account all of
15 the assets that Barclays was getting in this transaction or
16 only what you have referred to as the broker/dealer trading
17 assets?

18 A. When I gave that advice, I was referring to all of the
19 assets being purchased by Barclays.

20 Q. Okay. And when did you tell the committee your opinion as
21 to whether or not Barclays was going to get an economic gain
22 from this transaction?

23 A. Trying to remember if it was -- the first time was
24 Thursday, Friday or Sunday. I could tell you that it was a
25 given that the broker/dealer business, the 250 million dollars

1 for the broker/dealer, was viewed by all of us as being
2 incredibly and inexpensively huge gain for that going concern
3 engine. So that was a premise of the deal from the start. So
4 whenever we described the transaction or had discussions with
5 people, we probably said, wow, Barclays is making out like
6 bandits on the broker/dealer business. I don't have a specific
7 recollection of a particular date but it wouldn't surprise me
8 if, in my pitch to the committee on Wednesday when we got
9 retained, we said, wow, 250 million for the premier
10 broker/dealer business. So, at all times.

11 Q. So that at all times during your conversations with the
12 committee, to the extent that you would be talking about
13 whether or not Barclays was going to have an economic gain, you
14 would have been telling the committee that, in your opinion,
15 Barclays was going to have an economic gain, correct?

16 A. Yes.

17 Q. Now, did there ever come a time when anyone at the
18 committee asked you for any estimate or approximation of how
19 much an economic gain Barclays was certain to achieve on this
20 transaction?

21 A. No, with an explanation.

22 THE COURT: I think that means that the witness would
23 like to give an explanation. Mr. Burian, why don't you
24 complete your answer?

25 MR. BOIES: Yes.

1 A. With respect to whether we thought Barclays was making the
2 most money in the broker/dealer, there was really no way for us
3 to estimate and the committee did not ask for an estimate.
4 When we raised concerns about the trading assets on the Sunday
5 call, we were asked whether we could estimate if, in fact,
6 there was a gain. And that's when I think I testified
7 yesterday that we were very frustrated that we could not
8 provide one because of the number of privates in the
9 transaction and confusion about which assets were going or not
10 going. So the committee asked if we had an estimate with
11 respect to a portion of it but not with respect to other
12 portions.

13 Q. Let me be sure I understand what you're saying. It was a
14 given, it is your testimony, that Barclays was going to have an
15 economic gain from the transaction, correct? And "the
16 transaction" means the entire purchased transaction.

17 A. Yes. We assumed from the start that Barclays was going to
18 make money. They were picking up assets in the broker/dealer
19 business inexpensively.

20 Q. Okay. Now, you've also distinguished what you referred to
21 as the trading assets which were a part of, but only a part of,
22 the total transaction, correct?

23 A. Correct.

24 Q. And do I understand that you were asked at some point
25 whether Barclays was going to have a gain just on the trading

1 assets?

2 A. Correct.

3 Q. And just to be clear, when we talk about the trading
4 assets, we're talking about the trading assets and the trading
5 liabilities, correct?

6 A. Correct.

7 Q. And is that something that you have sometimes referred to
8 in your testimony as the broker/dealer book?

9 A. Correct.

10 Q. Okay. And I'll try to use that language. Did there come
11 a time when the committee asked you whether, in your opinion,
12 Barclays was going to have an economic gain on the acquisition
13 of what you refer to as the broker/dealer book, just those
14 trading assets and liabilities?

15 A. Oh. In that case, the answer -- when we were talking
16 about the trading book and the balancing as ascribed in the
17 balance sheet and yesterday, we were including the comp and
18 cure as part of liabilities. If you're now narrowly defining
19 the trading assets as merely the broker/dealer book and then
20 the repo transaction that was secured by those assets, then the
21 answer is yes, we always assumed that there would be a gain for
22 Barclays. And we told the committee that there'd be a gain.
23 What balanced it out was the fact that there were the other
24 four and a quarter billion of assumed liabilities. That was
25 always presented to us as a package. The way you're describing

1 it, I now see you're excluding that, so I apologize.

2 Q. Okay. I think I understand --

3 A. If you don't, ask me again.

4 Q. -- what you're saying. But let me just be sure the
5 record's clear. The --

6 (Pause)

7 Q. The transaction as a whole is one thing. The trading
8 assets and liabilities is another. And comp and cure is
9 another component. Is that right?

10 A. We -- in my testimony yesterday and earlier before I
11 finally understood your distinction, I was focusing on comp and
12 cure as part of the trading assets --

13 Q. Okay. Then I'll leave it --

14 A. -- which is why I corrected my answer. Which is why I
15 corrected my answer. You asked me --

16 Q. I'm happy to have -- excuse me. I'm happy to have how
17 ever you use the term. I just want to get how you used the
18 term. When you were using the term "the broker/dealer book" or
19 "the broker/dealer trading assets", am I understanding you that
20 you were including the trading assets, the trading liabilities,
21 plus comp and cure.

22 A. I don't remember which question we're referring to
23 anymore, but the answer is we expected a gain if you're only
24 including the repo liabilities against the trading assets. If
25 you were including comp and cure, we're expecting that Barclays

1 would actually be even or lose a little money.

2 Q. And by trading assets, are you referring to the repo
3 assets?

4 A. If we're talking about Sunday evening, then we're talking
5 about the repo assets and the box. If you're talking about
6 Wednesday, Thursday and Friday until someone told me about the
7 repo -- the box, then we're talking about -- I didn't know
8 there was a box. So we're not talking about the box.

9 Q. Sunday evening and Monday morning, when you were talking
10 about trading assets, you were talking about the repo assets
11 plus the clearance box assets, correct?

12 A. Correct.

13 Q. And you understood that those were assets that Barclays
14 was acquiring, correct?

15 A. Correct.

16 Q. And when you talk about the repo liability, you're talking
17 about the forty-five billion dollars or approximately forty-
18 five billion dollars that Barclays had paid to satisfy Lehman's
19 repo loan, correct?

20 A. No, with an explanation.

21 Q. How much was the repo liability as you understand it, too?

22 A. We were told it was 45.5 billion --

23 Q. Okay.

24 A. -- not forty-five billion.

25 Q. Okay. 45.5. That's why I said approximately.

1 A. 500 million off.

2 Q. So you believed the repo liability was 45.5 billion
3 dollars, correct?

4 A. That is what I was told and what I believed.

5 Q. And you believed that the trading assets that Barclays was
6 acquiring including both the Lehman securities that were the
7 repo securities plus the clearance box assets totaled how much?

8 A. I think it was roughly forty-five billion of repo assets
9 and 1.9 billion of clearance box. Those numbers refer to book
10 value in a manner in which a broker/dealer would ordinarily
11 mark their books.

12 Q. Now when you say "those numbers", you represent what you
13 say is the book value the way a broker/dealer would normally
14 mark their books, are you referring to the forty-five billion
15 dollars, the 1.9 billion dollars or both?

16 A. Both.

17 Q. Both. Now, who told you that the forty-five billion
18 dollar valuation represented book value as a broker/dealer
19 would ordinarily mark their books?

20 A. I have no specific recollection of anyone using those
21 exact words.

22 Q. Now, Sunday night and Monday morning -- you believed that
23 if you simply looked at the trading assets that Barclays was
24 acquiring, the repo assets plus the clearance box assets, and
25 compared it to the repo liabilities, Barclays was going to book

1 a gain, correct?

2 A. Correct.

3 Q. You believed that if you then factored in the comp and
4 cure obligations that Barclays was assuming, Barclays would
5 have, just taking those aspects of the transaction, have a
6 loss, correct?

7 A. No.

8 Q. Did you believe Sunday night and Monday morning that the
9 amount of comp and cure that Barclays was taking on was going
10 to be more than the difference between what you have described
11 as the trading assets and the trading liabilities.

12 A. As I said earlier, Mr. Boies, I thought the comp number
13 was a firm number. And these 45.5 plus roughly one billion is
14 46.5. The asset side was 45 plus 1.9 which is roughly almost
15 47. I didn't have, at that time, a firm number in my head for
16 the cure. I knew I had a debtor estimate of -- Ms. Fife said
17 at the hearing. But I can tell you that I sat in that room and
18 said that Barclays is going to book a loss. What I said was
19 that depending on -- what I said was that I was told that the
20 transaction was worse for Barclays than what was ascribed to
21 the Court.

22 Q. My question may not have been clear although I think it
23 was. I was asking what you believed not what you were told.

24 A. What I believed -- is what I answered the question -- I
25 did not have a firm belief as to the amount of the cure. And

1 therefore, I did not have a firm belief that Barclays was going
2 to lose money. If the cure was more than half a billion
3 dollars, you would lose money on those elements. If it was
4 less than half a billion dollars, you would have a little bit
5 of a profit on that side. I expected cure to be higher but I
6 didn't have a firm belief. I didn't walk out of that room
7 saying you're going to have a loss.

8 Q. Okay. I just want to be sure I've got the arithmetic
9 right. The trading assets including both the value of the repo
10 securities Barclays was acquiring and the value of the
11 clearance box assets Barclays was acquiring was approximately,
12 according to you, forty-seven billion dollars, correct?

13 A. Correct.

14 Q. Now, the repo liability, according to you, was 45.5
15 billion dollars, correct?

16 A. Again, based on what my belief was?

17 Q. Yes.

18 A. Not according to me. I was just -- knew what I was
19 talking --

20 Q. Yes. What you believed.

21 A. I believed it was 45.5.

22 Q. And you believed that the comp number was a firm number at
23 two billion dollars, correct.

24 A. That's a good point. Two -- I may be getting confused,
25 but yes. I -- whatever the comp number, I felt was a firm

1 number. And you're right. It's two billion not one.

2 Q. Okay. So the repo liability, 45.5, plus two billion
3 dollars is 47.5, correct?

4 A. Correct.

5 Q. And 47.5 is obviously more than what you thought the
6 trading assets were including both repo assets and the
7 clearance box assets, correct?

8 A. Correct.

9 Q. So even if Barclays paid nothing in comp --

10 A. In cure.

11 Q. In cure, excuse me. Even if Barclays paid nothing in
12 cure, was it your belief that Barclays -- just looking at
13 trading assets, trading liabilities, comp and cure, that
14 Barclays was going to have a loss on the transaction?

15 A. Yes. Thank you for correcting my arithmetic. I forgot
16 that the comp was two billion not one billion.

17 Q. Okay. If you look at the entire transaction, though, it
18 was your understanding that Barclays was going to have an
19 economic gain on the transaction, correct?

20 A. Correct.

21 Q. So just to move from the specific to the general, if you
22 simply look at trading assets and trading liabilities without
23 anything else, Barclays was going to have a gain. If you
24 looked at trading assets, trading liabilities plus comp and
25 cure, Barclays was going to have a loss. If you looked at the

1 entire transaction, all of the assets and liabilities involved
2 in the transaction, Barclays was going to have an economic
3 gain. Is that fair?

4 A. Yes.

5 Q. Okay. And that's what you understood at the time of the
6 transaction, is that correct?

7 A. Yes.

8 Q. And insofar as you believed at the time, is that what the
9 committee understood?

10 A. Yes.

11 Q. Okay. Recognizing that the cure number had some
12 discretion in it, was there ever any effort made by you or,
13 insofar as you were aware, the committee to estimate how much
14 of a loss you believed Barclays was going to have if you looked
15 at only trading assets, trading liabilities, comp and cure?

16 A. Other than to seek their conciliation to see what exactly
17 was transferred and therefore add it up, I mean, if that's what
18 you're referring to, yes. If you're asking for something other
19 than that then no.

20 Q. Did you ever do anything prior to the closing to try to
21 figure out what you thought the net result of just trading
22 assets, trading liabilities, comp and cure were going to be?

23 A. I testified yesterday about our efforts on Thursday,
24 Friday, Saturday and Sunday to get to the bottom of the
25 transaction, sir. And that's what we did.

1 Q. Other than the conversations that you say you had with Mr.
2 Klein early in the morning of September 22nd for eighteen
3 minutes --

4 A. I didn't say eighteen minutes. I said --

5 Q. Approximately eighteen minutes.

6 A. -- say, between seven and eighteen minutes, you know,
7 twenty minutes. Eighteen minutes is an estimate. I'm sorry if
8 it's become an issue.

9 Q. Okay. Seventeen to twenty minutes, is that what you're
10 saying?

11 A. There we go.

12 Q. What?

13 A. I don't have a specific recollection. I think my first
14 utterance was, you know, five to eighteen minutes and you made
15 a big deal of eighteen minutes.

16 Q. Oh, five to eighteen minutes.

17 A. So I backed into it and said maybe ten or twenty. I don't
18 have a specific recollection. It was long enough to have the
19 exchange with Mike Fazio to ask a question that gets shot down
20 by Harvey. I described the substance of the conversation in
21 some quotes. I haven't timed how long that would take. I
22 don't remember exactly how long it took.

23 Q. I think I simply may have misheard your original answer.
24 When I asked you how long it was, did you say five to eighteen
25 minutes?

1 A. My first guess was five to eighteen minutes.

2 Q. Okay. Other than this conversation of five to eighteen
3 minutes --

4 A. Five seems low now.

5 Q. Say again?

6 A. I said five seems low now when I recollect how much was
7 said. I don't --

8 Q. Okay.

9 A. I don't have a firm recollection. I'm not going to make
10 it up.

11 Q. Okay. Other than this one conversation --

12 A. There you go.

13 Q. -- with Mr. Klein the morning of September 22nd, did you
14 have any other conversations with any Barclays representatives
15 prior to closing?

16 A. Nothing specific that I can recall. I'm sure I saw them
17 in the hallways and getting popcorn in the kitchen. I just
18 don't -- nothing substantive.

19 Q. Let me ask you to look at a document that is behind tab

20. It is Barclays' Exhibit 285. Is this a document you've
21 ever seen before?

22 (Pause)

23 A. Am I copied, Mr. Boise?

24 Q. I don't see you as being copied.

25 A. Mr. Boies, I don't have a specific recollection. I

1 remember your colleague showing me e-mails at or around the
2 closing forwarding to me the press release. But I can't tell
3 you I recognize if this is the particular one.

4 Q. The top e-mail is an e-mail from Edward Gilbert on Sunday,
5 September 21st at 3 p.m. Do you see that?

6 A. I do.

7 Q. Do you know who Edward Gilbert is?

8 A. Yes.

9 Q. Who is he?

10 A. He was the committee representative from Shinsei Bank. He
11 was one of the committee members.

12 Q. And he sends this to a number of people. Are any of the
13 people who he sends it to also committee members?

14 A. Actually -- David Schamis, Christopher Flowers, Mitten Baj
15 Jacob (ph.), Jay Jorro (ph.), Sally Walker. I don't recognize
16 those names, sir. Could be but I don't recognize those names.

17 Q. Okay.

18 A. You recognize, sir, that committee membership is by
19 institution not by individual. So sometimes there'll be a
20 meeting and someone else will show up as an institution
21 announcing or not announcing themselves. So just 'cause I
22 don't recognize the name doesn't mean they're not a committee
23 member. But I don't -- sitting here, I don't recognize these
24 names.

25 Q. Now, the original message earlier in the day was from a

1 Jacob Goldfield. Do you see that?

2 A. I do.

3 Q. Do you know who he is?

4 A. I do not.

5 Q. And the message that goes to Mr. Gilbert and others from
6 Jacob Goldfield is referencing the Barclays investor call that
7 we've marked as Exhibit 110. Do you recognize that?

8 A. I see that, sir.

9 Q. And it says, after referencing it, where they describe
10 "how great the Lehman buy is". Do you see that?

11 A. Yes.

12 Q. And Mr. Gilbert writes back, "Thanks, Jacob. We will make
13 sure this information is considered in the Lehman proceeding."
14 Do you see that?

15 A. Yes.

16 Q. Did the committee insofar as you are aware, ever make sure
17 this information was considered in the Lehman proceeding?

18 A. Depends what you mean by Lehman proceeding. Yes. We
19 considered in connection with our analysis of the transaction.

20 Q. Was this information information that, insofar as you were
21 aware of, the committee ever brought to the attention of the
22 Court?

23 A. Before the closing?

24 Q. Let's begin with before the closing.

25 A. No. There were no hearings before the Court between 3

1 p.m. on Sunday and the closing, sir.

2 Q. Was this information that the committee ever brought to
3 the attention of the Court after the closing?

4 A. I'm not familiar with all the filings in connection with
5 this case. So I don't know if it was something that was filed
6 somewhere by -- I have no specific recollection of --

7 Q. Insofar as you are aware, is this something that the
8 committee ever brought to the attention of the Court at any
9 time in 2008?

10 A. Mr. Boies, I just don't recall if this is mentioned in our
11 objection to the December settlement. I know it was mentioned
12 somewhere in the complaint, in the 60(b) complaint. I just
13 don't know exactly, sir. I don't recall exactly.

14 Q. The 60(b) complaint was filed months after the end of
15 2008, correct?

16 A. Correct.

17 Q. Other than possibly mentioning it, and we can check the
18 record, in the December 2008 objection, was this information
19 about the Barclays gain and the statements in the press
20 conference or analyst meeting ever brought to the attention of
21 the Court by the committee insofar as you know.

22 A. Insofar as I know, the committee in 2008 did not bring to
23 the Court the accounting gain announced by Barclays.

24 Q. Or anything else that was said in the press release -- or
25 analyst meeting, is that correct?

1 A. I have to go now and read the whole analyst meeting. But
2 I have no recollection of using -- of that analyst meeting
3 being used in a court proceeding in 2008.

4 Q. Okay. Insofar as you were aware, was there ever any
5 discussion within Houlihan or with members of the committee
6 about whether the fact that Barclays had announced an
7 accounting gain should be brought to the attention of the
8 Court? That's a yes or no question and you can have an
9 explanation afterwards.

10 A. Yes with an explanation.

11 Q. Okay. What's the explanation?

12 A. We had conversations internally about the reconciliation,
13 the investigation, whether we'd have to sue Barclays. And
14 obviously, the accounting gain was mentioned in that context.
15 We never specifically, as in we need to bring the accounting
16 gain, individually, to the Court's attention. So I'm trying to
17 be over-inclusive, but again, as I said before, this was not
18 viewed as a highly material event that warranted a specific
19 consideration.

20 Q. When did you first have internal conversations about
21 whether you would have to sue Barclays?

22 A. Well --

23 Q. When was the first such time?

24 A. The first time that it probably ever came up was my memo
25 to the committee Monday morning after the closing when we told

1 the committee, this is the deals we were represented. And if
2 it is the deal, great; if it's not the deal, Barclays will be
3 hearing from us or from LBI. I guess you can consider that
4 contemplating a suit against Barclays. If you're asking the
5 first time we seriously discussed the need to go actually sue
6 Barclays because we were convinced or concerned that this was
7 really a problem, I'd have to get to the December/January time
8 frame, sir.

9 Q. Now, in that last answer, you used two words, "convinced"
10 or "concerned". And -- because those might often have
11 different meanings, I'd like to split it up. When did you
12 first become concerned that you might have to sue Barclays,
13 that the committee might have to sue Barclays?

14 (Pause)

15 A. Now we're really going to parse words. Obviously, my memo
16 to the committee contemplated that if we're misrepresented to,
17 we may have to pursue a remedy. When I first became concerned
18 that we'd actually have to sue Barclays was following the
19 conference calls with Cleary after the judge's direction to
20 help us get our reconciliation.

21 Q. Now, when you refer to your memo, you're referring to your
22 September 22 memo to the committee, is that correct?

23 A. Yeah. The Monday morning memo after the closing.

24 Q. Now -- and when you refer to the conference calls with
25 Cleary, those were conference calls that took place in December

1 of 2008 or January of 2009, correct?

2 A. I'm pretty sure it happened after the new year, in January
3 or February.

4 Q. Okay. So between your memo on September 22 and
5 January/February of the following year, were there any internal
6 discussions within Houlihan or within the committee that you
7 were aware of about possibly having to sue Barclays?

8 A. Yes.

9 Q. When were the first such discussions?

10 A. I don't have a specific recollection. When Brad -- you
11 want me to help you?

12 Q. Approximately.

13 A. I'm trying to --

14 Q. No. What I want you to do is answer my question. And if
15 you don't remember specifically, I want you to tell me
16 approximately when were those discussions.

17 A. You know, it's hard to pin it down exactly. I will tell
18 you that in late September or early October certainly after the
19 committee meeting with Alvarez and I being -- we being asked to
20 brief Milbank on all the issues, people in my firm would come
21 to my office and say, you know, do you think we're going to
22 have to sue someone. What's your understanding of what's going
23 on? Are we going to get the reconciliation? And loose talk.
24 I know in my presence when we briefed Milbank -- no. The idea
25 was either there's a logical explanation or we'll get a

1 reconciliation. Or I can do something about it. I don't
2 remember if the word "law suit: or "sue" was used.

3 But the backdrop, Mr. Boies, to all the conversations
4 about the reconciliation was if things weren't as they appeared
5 and Barclays took more than they were entitled to, someone
6 would have to do something about it. And, by the way, if
7 you're talking about the committee suing Barclays, that
8 probably was never really discussed. We always thought the
9 debtor would be the plaintiff. I thought the debtor would be
10 the one -- Alvarez & Marsal would do it, not us. So I just
11 want to make sure I'm not missing a nuance in your question.

12 Q. My question right now is when, as near as you can tell us,
13 were the internal discussions about the possibility of having
14 to sue Barclays. When was the first time after your May (sic)
15 22 memo?

16 A. September 22.

17 Q. Yes. I apologize. When was the first time after your
18 September 22, 2008 memo that there were internal discussions
19 about having to sue Barclays. I understand that you don't
20 remember exactly. What I'm asking you to do is to give the
21 Court your best approximation of when those first internal
22 discussions took place.

23 A. Whenever we talked about aggressively pursuing a
24 reconciliation. The contemplation that a suit against Barclays
25 was possible was either explicit or implicitly stated. So that

1 would be in the September/October/November time frame,
2 September/October time frame.

3 Q. Now, you talked about briefing Milbank. When did you
4 brief Milbank about the possibility of having to sue Barclays.

5 A. Okay. It's not exactly what I said. The brief was not
6 about the possibility of suing Barclays. What I testified and
7 what happened was that after -- Milbank was more or less up to
8 speed but not really focused on the economics of the
9 transaction. But after the October 8th committee meeting, we
10 were specifically asked to make sure that Milbank understood
11 exactly what the concerns were so they could be more effective
12 in going to Weil Gotshal to press for the reconciliation. So
13 in that time frame, we were briefing Milbank to get a
14 reconciliation. And obviously, the context of that is if the
15 reconciliation came out wrong, it didn't reconcile, it would
16 have to be a law suit. I just don't -- you're turning my words
17 a little bit by saying we briefed them to sue as opposed to we
18 briefed them to be knowledgeable and aggressive in getting a
19 reconciliation.

20 Q. I think my question was about the possibility of suing
21 them. But my question is when. When did this briefing of
22 Milbank take place?

23 A. And again, if you define the possibility of a suit to
24 include briefing someone to aggressively pursue a
25 reconciliation, it would be in the October 8th to October

1 15th -- no. That -- that time period shortly after October 8th
2 when we pushed again to get that reconciliation.

3 Q. Now, in a prior answer, you talked about Barclays taking
4 more than they were entitled to. Do you recall that?

5 A. I do, sir.

6 Q. You were aware from your reading of the APA and the
7 clarification letter that there was no specification in either
8 of those documents as to the valuation of the assets that
9 Barclays was acquiring and the liabilities that it was
10 assuming, correct?

11 A. No.

12 Q. You were not aware of that?

13 A. I was not.

14 Q. What, as you understood it, was the valuation of the
15 assets that Barclays was acquiring that was in the APA and the
16 clarification letter?

17 A. I don't have it in front of me, Mr. Boies. But I believe
18 that the asset purchase agreement said that you were -- that
19 Barclays was buying seventy-two billion book value assets and
20 assuming sixty-eight billion of liabilities.

21 Q. And, sir, those provisions were explicitly taken out by
22 the clarification letter, correct?

23 A. They were explicitly taken out by the clarification
24 letter. They were modified to reflect the assets that actually
25 were supposed to be transferred. But -- are you asking me a

1 legal question or a factual question? I'm not sure.

2 Q. I'm asking you a factual question, sir. You read the
3 clarification letter, right?

4 A. I did.

5 Q. And did the clarification letter, according to your
6 reading, excise, take out, nullify the provision that you've
7 just identified about seventy-two and sixty-eight billion
8 dollars of book value assets and liabilities?

9 A. I have no recollection of whether the clarification letter
10 removed it and removed it in a manner of valuation. I do have
11 a very firm recollection that the clarification -- I guess that
12 will be clarified which assets were being transferred. But I
13 don't have any recollection of it modifying the valuation
14 accounting.

15 Q. Well, let's look at the clarification letter. That's
16 Exhibit 5. And I've got it up on the screen. And let me go to
17 the portion where it addresses what had been in the -- prior
18 APA. And in the APA -- and let me go -- that's Exhibit 1.

19 (Pause)

20 Q. Section (d), 1(d), talked about the purchased assets being
21 government securities, Commercial Paper, corporate debt,
22 corporate equity, exchange-traded derivatives and collateral
23 short term agreements with a book value as of the date hereof
24 of approximately seventy billion dollars (collectively, "the
25 long position"). You see that?

1 A. I do.

2 MR. BOIES: Give me a copy of it.

3 Q. Now, you understood that that --

4 MR. BOIES: Clarification letter.

5 Q. You understood that that provision had changed in the
6 clarification letter, correct, sir?

7 A. You were pointing it out to me. I didn't have -- what
8 period of time are we talking about?

9 Q. What period of time are we talking about?

10 A. Sunday? Monday? Now?

11 Q. The clarification letter. The final clarification letter.
12 The clarification letter that was signed, filed with the court,
13 given to you, that final clarification letter. You understood
14 that that took out the seventy billion dollar figure, correct?

15 A. As of when, sir? When are you asking me did I understand
16 whether that was true?

17 Q. Oh. Well, you said you read the clarification either on
18 Monday or Tuesday, the 22nd or 23rd of September of 2008,
19 correct?

20 A. Which is why I asked you whether or not this is before or
21 after the closing. If you're asking me did I understand the
22 clarification letter modified this provision, the answer is
23 yes, in the time frame after the closing.

24 Q. Okay. Let me just ask you did you read the draft
25 clarification letter before the closing?

1 A. I believe I did.

2 Q. And in the drafts that you read before the closing, did
3 those drafts change paragraph 1(d)?

4 A. I don't specifically recall.

5 Q. You left Weil Gotshal somewhere, what, around 5 in the
6 morning on Monday?

7 A. It may have been a little earlier, sir. I think I said
8 somewhere between 3 and 5. I'm not sure.

9 Q. Okay. At the time that you left, the draft of the
10 clarification letter that existed, did that draft include the
11 seventy billion dollar figure?

12 A. I don't know. When I left, there were still negotiations
13 and discussions. I didn't have a -- I still didn't have a
14 clarification letter that was in final form.

15 Q. No, no, no. I'm talking about the draft that existed when
16 you left. The draft that existed when you left, did that draft
17 refer to the seventy billion dollar figure?

18 A. Mr. Boies, as I said to you earlier, we were not part of
19 the discussions. I had a draft either from Saturday night or
20 Sunday. If you're asking me whether some draft that I happened
21 to have on Saturday night or Sunday in its text said seventy
22 billion, of course not. If you're asking me whether it defined
23 "purchased assets", probably it did. If you're asking me what
24 my understanding was, whether I understood that that
25 clarification draft in my hand was radically changing the

1 methodology of the valuation of assets, the answer is no. Now,
2 you can point out and tell me the document said what it said or
3 didn't say what it said. But I'm telling you what I knew and
4 what I understood at the time.

5 Q. My question's a little different, sir. In the asset
6 purchase agreement, there is a valuation of certain assets,
7 correct?

8 A. There's a reference to a valuation methodology, yes.

9 Q. There's a reference to a valuation methodology. And the
10 valuation methodology that you're referring to there is the
11 reference to what is called book value, correct?

12 A. Correct.

13 Q. Okay. Now, was there, in the clarification letter or any
14 draft of the clarification letter that you ever saw, any
15 reference to book value?

16 A. I don't recall about any draft I ever saw. I believe that
17 the final version I received on Monday does not have a
18 reference to book value.

19 Q. Okay. Now, let me try to walk you through this. This is
20 Exhibit -- this is the APA exhibit, Exhibit 1. And 1(d) is
21 what refers to government securities, the long position with
22 "the book value as of the date hereof, approximately seventy
23 billion dollars". You see that?

24 A. I do, sir.

25 Q. Now, if you look at the clarification letter, the list of

1 purchased assets, 1(a)(i) says "The items set forth in clauses
2 (b), (c), (f) through (o) and (q) through (s)". Do you see
3 that?

4 A. You're referring to the second 1(a)(i), I assume, not the
5 first 1(a)(i).

6 Q. Do you see where it says "The items set forth in
7 clauses" --

8 A. Yes.

9 Q. Okay.

10 A. The second 1(a) -- the second 1(a)(i).

11 Q. And that omits 1(d), correct, sir?

12 A. "The 'purchased assets means all the assets...and none of
13 the assets associated with LBHI other than the assets of
14 LBI...otherwise specifically provided in the agreement or this
15 letter. Purchased assets shall include items set forth in
16 clauses (b), (c), (f)...(o) and (q) through (s).' The other
17 paragraph was (d), correct?

18 Q. Yes, sir.

19 A. So that's -- why are you showing me 1(a)(i) instead of
20 1(a)(ii)?

21 Q. Well, I'm showing it to you to make clear that, first, the
22 definition of "Purchased Assets" skipped 1(d); and, second,
23 explicitly 1(d) was substituted by something else. In other
24 words, in two separate parts of this clarification letter, it
25 made clear that 1(d), the reference to book value and seventy

1 billion dollars and any valuation of the assets, was taken out.
2 And I'm asking whether you understood that at the time that you
3 read the drafts that did that and the final clarification
4 letter that did that. Did you understand that, sir?

5 A. Mr. Boies, if you think this clarification letter was
6 clear of any of the things you just said then you're a better
7 reader than I am. I read this paragraph and it says -- there's
8 so many exclusions and inclusions. For instance, "except as
9 otherwise specifically provided in the Agreement", which maybe
10 you can tell me refers to the APA, and then it says or in "this
11 Letter". And then it says "Purchased Assets shall include".
12 Then you go down in (ii), the repo transactions and such stuff
13 in securities, clearance boxes. I will grant you there's no
14 reference to seventy billion book value which would have made
15 no sense. If you're trying to imply that I understood what
16 these words meant and all the complicated writing just by
17 quickly reading this, I did not have a firm understanding of
18 what these changes were.

19 Q. Did you ever tell anybody prior to closing that you didn't
20 understand what the clarification letter was doing?

21 A. As I testified yesterday, somewhere between 3 in the
22 morning, or whatever, I got more and more agitated and demanded
23 to know what was going on. What are the changes? Why are they
24 being made and what's the impact on the Lehman estates?

25 Q. My question's a little different, sir. You had a copy of

1 the clarification letter. There was a -- in fact, there was a
2 call with the committee, including Houlihan and Milbank Tweed
3 where somebody walked through the clarification letter Sunday
4 night, correct?

5 A. We discussed the content of the draft we had. I'm not
6 sure we walked -- we didn't -- I don't believe we walked
7 through line by line or paragraph by paragraph.

8 Q. Prior to this call with the committee, you'd read the
9 clarification letter, correct?

10 A. I believe I read most of it.

11 Q. Did you tell the committee on this call that you didn't
12 understand what assets were in and what assets were out under
13 the clarification letter?

14 A. Yes.

15 Q. Did you walk the committee through what your best
16 understanding was of the clarification letter at that time?

17 A. We walked them through what we believed were the three
18 most significant issues impacting the committee arising from
19 the full panoply of circumstances between Saturday and Sunday.
20 The three major and material issues were then summarized in my
21 memo to the committee.

22 Q. Let me ask you to look at your deposition that is -- this
23 is your second day of deposition. I'm not sure that was in
24 what your counsel what your counsel handed you.

25 MR. KIRPALANI: It is.

1 MR. BOIES: It is?

2 MR. KIRPALANI: It is at the back after the --

3 MR. BOIES: At the back.

4 Q. Sir, at the back, if you look at -- from the back, you'll
5 find -- there's a blue divider of what your counsel gave you.
6 And that blue divider separates your first and second day of
7 deposition. And I'd like you to go to your second day of
8 deposition, page 21, lines 2 through 6.

9 A. There's a blue divider?

10 (Pause)

11 A. I think I'm there, page 21.

12 Q. Okay. And you're being asked about this call.

13 "Q. At the time of the call, had you reviewed a draft
14 clarification letter?

15 "A. I believe we did. I believe that on the call, somebody
16 walked through our best understanding of it at the time."

17 Do you see that, sir?

18 A. I do.

19 Q. And you gave that testimony at the time, did you?

20 A. I did.

21 Q. And it was truthful and accurate at the time you gave it?

22 A. And remains true and accurate.

23 Q. At the time of this call, when somebody walked through
24 your best understanding of the clarification letter at the
25 time, did you understand that there was no valuation of any

1 assets contained in the clarification letter?

2 A. No. I don't believe that came up.

3 Q. Whether or not it came up in the call, did you understand
4 that that was true?

5 A. No.

6 Q. Do you understand today, as you sit here, that in the
7 clarification letter there is no valuation of any of the assets
8 that are being acquired?

9 A. I could read it through again, sir. I do not -- I don't
10 believe there's a number in the clarification letter that
11 refers to the repo purchased assets or something.

12 Q. Did you ever suggest to anyone that the clarification
13 letter should include a valuation methodology?

14 A. I'm sorry for laughing. Just the idea of me suggesting
15 changes to the letter that night is humorous. No. I did not
16 make that suggestion.

17 Q. And, sir, I take it, it would be true that you never
18 suggested that the clarification letter include a provision
19 that provided a valuation or estimated valuation for any of the
20 assets that were being acquired, correct?

21 A. Mr. Boies, that night I made no specific recommendations
22 of modifications to the clarification letter.

23 Q. Did you, without recommending a specific valuation, did
24 you generally recommend that the clarification letter should
25 include some valuation or some valuation methodology for the

1 assets that were being acquired?

2 A. I think I answered that already.

3 Q. And the answer to that is no?

4 A. I said that night I do not recollect making any specific
5 suggestions of modifications to the clarification letter.

6 Q. And I want to be sure that there's not some
7 misunderstanding with respect to your use of the word
8 "specific", sir.

9 A. Okay.

10 Q. And so, what I'm asking is whether you consider it
11 specific or general, did you make any suggestions or
12 recommendations that the clarification letter should include
13 some valuation, some valuation methodology, whether or not it
14 was a specific number that you had in mind or not.

15 A. I did not.

16 Q. Okay. Insofar as you were aware, prior to closing, was
17 there any discussion among anybody as to whether the
18 clarification letter should or should not include any valuation
19 of the assets being acquired or any valuation methodology?

20 A. I'm not aware of those discussions.

21 Q. Okay. Let me direct your attention to Movants' Exhibit
22 709, which is -- it's in my book, tab 34. It's in your
23 counsel's book as well. This is a document that your counsel
24 spent some time with you on yesterday.

25 A. I recognize the document, sir.

1 Q. And if you go to the Houlihan memo that is attached dated
2 October 10, 2008, that says "LBI sale value of assets
3 transferred to Barclays". Do you see that?

4 A. I'll -- Mr. Boies --

5 Q. Yes?

6 A. -- just to make this go quicker, this is not a Houlihan
7 memo. This is an insert to a Milbank memo. Most of this
8 text -- I believe that a lot of this text came from Milbank and
9 Mr. Geer only started writing from the components of value as
10 an insert to walk Milbank through the issue. But I can't be
11 sure. I don't know -- see the footer, Mr. Boies? NY1?

12 Q. Yes.

13 A. That's not a Houlihan footer.

14 MR. BOIES: Incidentally, Your Honor, I think last
15 night, counsel produced to us a unredacted version of the first
16 page of 709.

17 THE COURT: Are we going to substitute pages?

18 MR. BOIES: And if we could substitute pages.

19 Q. Now, this document is marked as Barclays' Exhibit 813B.
20 But I believe it is exactly the same as Movants' Exhibit 709
21 except that the redacted portion on the first page has been
22 unredacted so that you can see that it is a -- an e-mail from
23 Clayton Bell. And he's at Milbank, correct, sir?

24 A. Yes, sir.

25 Q. -- to Michael Fazio and Brad Greer (sic). And they're

1 both at Houlihan, correct?

2 A. Correct.

3 Q. -- dated Friday, October 10th, 2008 at 9:14 a.m. And it
4 says "Here are some bullet points. Please add what detail you
5 can and send back to me. I will forward to Luc" --

6 Q. And that's Luc Despins, correct?

7 A. You're asking me?

8 Q. Yes.

9 A. Yeah. I think so, yeah.

10 Q. -- "with the transcript." And then Brad Greer (sic)
11 writes back: "I made some additions. Michael may have some
12 additional thoughts. I've also attached a summary version of
13 Schedule A.

14 Q. Do you see that?

15 A. I do.

16 Q. Now, as the Houlihan 30(b)(6) witness, I now want you to
17 focus on the attachment that is headed "LBI Sale Value of
18 Assets Transferred to Barclays." And is it your understanding
19 that this is a memorandum originally prepared by Milbank Tweed
20 to which Houlihan made some additions?

21 A. Mr. Boies, it is exactly what it is referred to. It's a
22 set of bullet points trying to brief Luc as to what the issues
23 are. If that's a memorandum to you, fine, it's a bunch of
24 bullet points on a page.

25 Q. If you're uncomfortable with the word memorandum for some

1 reason, is document sufficient?

2 A. Yes, sir.

3 Q. Okay. We'll use document. Is this document a document
4 that was prepared by Milbank Tweed to which Houlihan made some
5 additions?

6 A. Correct.

7 Q. And this is dated October 10, 2008, correct?

8 A. Yes.

9 Q. Now, let me go down to the bottom of the first page, where
10 it says the last sentence -- last two sentences, "A majority of
11 the value transferred to Barclays is contained on Schedule A, a
12 summary of which is attached." And that summary is the
13 previous page, correct?

14 A. Yeah. Yes, sir.

15 Q. And the document then goes on to say that Summary A at
16 face value shows approximately forty-three billion dollars of
17 value based on the marks in the Lehman system at the time of
18 the transaction, do you see that?

19 A. I do.

20 Q. And was it your understanding that the marks on the repo
21 securities of forty-three billion dollars, as shown on this
22 document, represented the marks for those securities in the
23 Lehman system at the time of the transaction?

24 A. No, with an explanation.

25 MR. BOIES: Your Honor, may I inquire whether the

1 Court would like to hear the explanation now, or if counsel for
2 the witness is able to do it on redirect. I'm happy to have
3 him do it. In view of the time constraints I'm trying to go
4 through what I need to cover, whichever way the Court would
5 like to do it, I want to do it.

6 THE COURT: I want to do it the most efficient way.
7 It's probably most efficient for him to explain now while it's
8 fresh, it's also on the screen, and we're thinking about it
9 together.

10 But I have a broader question of how we manage the
11 morning. Are you able to estimate at this juncture with
12 reasonable accuracy about how much longer you think you'll be
13 on your cross-examination of Mr. Burian?

14 MR. BOIES: Your Honor, I think it would probably take
15 me about thirty to forty minutes, excluding explanation time.

16 THE COURT: Well, in that case it's about an hour.
17 I'm just thinking about whether or not it makes sense after Mr.
18 Burian's explanation for us to take our morning break, and then
19 proceed with the remainder of your cross-examination, and then
20 any further examination. And I'm just guessing that's going to
21 get us to lunch.

22 So, Mr. Burian, we await your explanation before our
23 break.

24 THE WITNESS: Thank you, Your Honor.

25 A. I think what Mr. Geer is referring to is the best marks we

1 had at the time. It's a presumption by him since Jim Seery had
2 promised to give us updates. And because people had said we'd
3 get updates and we never got them, that this is all they had in
4 their system at the time of the transaction. But that's a leap
5 of faith in building the case that it looks like Barclays got a
6 lot more than we thought. It is not what we actually thought
7 at the time, or suspected at the time, nor do we even know if
8 that is true. And the Mr. Klein meeting was at premark and
9 postmark, we didn't know if on Friday the Lehman books were
10 updated, or in light of the tumult going on if that was done
11 less formally and, therefore, the system was updated or not.
12 So that's my explanation, Your Honor.

13 THE COURT: Before we take a break, do you want to
14 follow-up on any of that explanation?

15 MR. BOIES: I can do it after the break, Your Honor.

16 THE COURT: Fine. We'll take a break and we'll resume
17 at 11:05.

18 (Recess from 10:53 a.m. until 11:08 a.m.)

19 THE COURT: Be seated.

20 MR. KIRPALANI: Apologies, Your Honor. Mr. Burian is
21 just on his way back from the men's room; there was a long
22 line. And he was hopeful to move in front of it.

23 THE COURT: Oh. I thought when I was told everybody
24 was ready, I assumed we had a witness.

25 MR. KIRPALANI: He's literally down the hall, on his

1 way.

2 THE COURT: Okay. I'm not going to move then.

3 (Pause)

4 THE WITNESS: I apologize, Your Honor.

5 THE COURT: No problem.

6 THE WITNESS: I had too much water.

7 THE COURT: We want you to be comfortable.

8 THE WITNESS: I'm sorry, Your Honor.

9 RESUME CROSS-EXAMINATION

10 BY MR. BOIES:

11 Q. Mr. Burian, we've been looking at Barclays' Exhibit 813-B,
12 and I understand that this two-page document at the end is a
13 document that you have testified was prepared by Milbank with
14 from input from Houlihan. But do I take it from what you said
15 you did not participate in its preparation?

16 A. Many -- much of the information is derivative of me, but I
17 did not type this information and send it to Milbank.

18 Q. Did you ever review this document after it was prepared?

19 A. I saw it in my deposition, that's for sure. Before the
20 deposition most likely. Yes, it would be my purview to have
21 reviewed it. I don't have a specific recollection.

22 Q. Would you have reviewed this document at or about the time
23 that it was prepared?

24 A. On October 10th, probably not. Probably a little
25 afterwards.

1 Q. But you would have reviewed it sometime within a week or
2 so after its preparation?

3 A. Mr. Boies, I'm not going to give you an exact time. A lot
4 was going on that first two weeks in October, and I can't tell
5 you when I caught up on my e-mail and when I followed up in
6 reading this document. I do believe -- I have a recollection
7 of reviewing it, but I cannot give you a specific time.

8 Q. Do you have a recollection of reviewing it, roughly
9 contemporaneously, with it's preparation? That is, sometime in
10 October as opposed to weeks later?

11 A. I don't have a firm recollection of when exactly I
12 reviewed this particular document.

13 Q. When you got to the point of December and you're talking
14 about this objection, or limited objection that was filed, had
15 you read this document by then?

16 A. I don't have a specific recollection of when I read this
17 document.

18 Q. At anytime after you read this document, did you
19 communicate to either Milbank or anyone at Houlihan that you
20 thought something in the document was wrong?

21 A. I did not think that anything in the document was
22 materially wrong, so I didn't -- no, I did not.

23 Q. Going back to the document, the first page, you see at the
24 bottom where it is -- there's a reference to a Schedule A
25 haircut of five billion dollars?

1 A. I do.

2 Q. And was it your understanding in or about October of 2008
3 that there had been a five billion dollar haircut taken from
4 the values of the Schedule A assets that were acquired by
5 Barclays?

6 A. Let's see it. Not the way you described it, no.

7 Q. Schedule A was a list of the securities acquired by
8 Barclays, you understood that?

9 A. Yes, Mr. Boies, Schedule A is in quotations. What I
10 understood was that we had "a draft of schedule A" at some
11 indeterminate date had a Lehman mark of forty-three billion,
12 plus seven billion of cash, is fifty billion. We understood
13 that the transaction closed with a valuation that was roughly
14 five billion less than that. So if you're asking whether Mr.
15 Geer is summarizing what we believed at the time, that the
16 assets were five billion less than reflected on the Schedule A
17 we had received with marks, that is self-evident.

18 If you're asking me whether or not we believed that
19 Barclays got a five billion haircut off the actual Schedule A
20 assets, that were the ones that were transferred in the
21 transaction at the appropriate valuations for those
22 transactions, the answer is no.

23 Q. When a reference is made here to Schedule A assets and
24 those are the assets that are summarized on the second page of
25 this exhibit, correct? That add up to forty-two billion

1 dollars?

2 A. The "Schedule A" assets refers to the schedule here, which
3 refers to the document we got on Sunday, if you remember my
4 testimony, that had the marks on them, with all the testimony I
5 gave on yesterday about our understanding of what that document
6 was.

7 Q. You got at the end of September the Schedule A that Weil
8 Gotshal had filed with the Court, correct?

9 A. Yes, we did.

10 Q. And you understood at the time that Weil Gotshal was
11 representing to the Court that this Schedule A represented the
12 securities that were being transferred to Barclays, correct?

13 A. No, with an explanation. As you know from the settlement
14 agreement, as you know from the confusion I knew that that was
15 a Schedule A filed by Weil Gotshal to the Court, and it was
16 purported to be a draft of purportedly mostly correct of what
17 was scheduled. But I also knew with my personal experience
18 that it was highly likely to be materially amended in light of
19 all the loan transfers that were being described.

20 Q. Did anyone tell you that the schedule A that was going --
21 that was filed with the Court in September of 2008 was going to
22 be in your terms materially amendable?

23 A. It was in my --

24 Q. Did anybody tell you that?

25 A. No.

1 Q. Did you write anything that indicated that you believed
2 that the Schedule A that was being filed with the Court was
3 going to be materially amended?

4 A. I don't recollect whether I wrote anything that said I was
5 confused. We were uncertain about which assets were exactly
6 transferred. I believe it may have been one of the letters to
7 Barclays seeking the reconciliation, but I can't be sure.

8 Q. At anytime within sixty days of the time that Weil Gotshal
9 filed Schedule A with the Court did you or, to your knowledge,
10 anyone write anywhere to anyone that they believed that the
11 Schedule A filed with the Court was going to be materially
12 amended?

13 A. I have no specific recollection of a specific writing. I
14 do know that there was communications with Weil Gotshal,
15 including a nasty exchange between Luc and Lori about the need
16 to understand what assets were actually transferred, the
17 implication of which was clear that we didn't think that
18 Schedule A was accurate. To say Schedule A is inaccurate or
19 when are you amending the Schedule A, I can't tell you that. I
20 know that we pestered people to the point of their exasperation
21 to get the update which, if you don't draw the conclusion, we
22 thought it was inaccurate, I'm not sure what conclusion one
23 could draw.

24 Q. Let me be clear. I'm not asking you whether you thought
25 Schedule A was accurate or inaccurate, I'm not asking you

1 whether people were nasty or exasperated. I'm asking you
2 whether anyone, at anytime, to anyone within thirty -- within
3 sixty days of Weil Gotshal's filing Schedule A, wrote that they
4 believed that that schedule was going to be materially changed
5 or amended?

6 A. I don't know if there was a specific writing.

7 Q. Now, let me go back to the bottom of the first page of the
8 two-page Milbank/Houlihan document dated October 10, 2008. And
9 it talks about the forty-three billion dollars in value being
10 based on the marks in the Lehman system at the time of the
11 transaction, do you see that?

12 A. Yes.

13 Q. And the transaction that's being referred to there, is the
14 sales transaction that closed September 22, 2008, correct?

15 A. Correct.

16 Q. And with respect to the five billion dollar haircut that
17 is referred to immediately above that, would you agree with me
18 that taking a multibillion dollar haircut is not what happens
19 when a broker-dealer ordinarily marks its securities to market
20 in the ordinary course?

21 A. It depends on what you mean by haircut. And I'm sure
22 you'll get me to the second page of the memo where Mr. Geer
23 describes what the explanation was as to what he meant by
24 haircut. So, again, I want just to go -- I want more than you
25 for this to go faster, I just want to get clear that if you

1 mean by haircut as a discount off fair market value, that is
2 not typical other than when you do a repo in the ordinary
3 course. If you're asking me -- actually, I'm not sure what
4 you're asking me now.

5 Q. The term haircut is a term you've heard a number of times,
6 correct?

7 A. In many contexts.

8 Q. And you are aware that in repo financing there is
9 ordinarily a haircut, correct?

10 A. I'm sorry, say it again?

11 Q. You understand in repo financing there's ordinarily a
12 haircut?

13 A. Yesterday I testified that in a typical repo there would
14 be some room between the amount borrowed and the assets
15 collateralizing the obligation.

16 Q. And that is referred to as a haircut, correct, sir?

17 A. Correct.

18 Q. And in the course of your work prior to closing did you
19 have an understanding as to what the amount of the haircut had
20 been with respect to the fed repo?

21 A. I testified about that yesterday that we didn't know what
22 the amount of any particular haircut was on the date that the
23 fed first lent the money. And I don't think the fed did in
24 light of the confusion about what they actually got. But when
25 it comes to Barclays at closing we were pretty comfortable that

1 there was none.

2 Q. My question was about the fed repo, did you understand
3 that?

4 A. I have no knowledge of what the actual or assumed or
5 intended haircut in the fed repo was going to be at the time.

6 Q. Did you ever hear that when the fed did the repo financing
7 originally that there was a four or five billion dollar haircut
8 built into the transaction?

9 A. No.

10 Q. No one ever told you that?

11 A. No.

12 Q. And you haven't become aware of that at anytime since, is
13 that your testimony?

14 A. I don't recall anyone telling me that there was a -- 68
15 was -- 34 -- yeah, I don't recollect that conversation, sir.

16 Q. I'm not asking you whether you recollect a particular
17 conversation --

18 A. I don't recollect that coming up -- someone telling me
19 that.

20 Q. Or learning it somehow -- other way?

21 A. Sir, could I see the Thursday balance sheet that I was
22 shown yesterday?

23 Q. If your counsel will find it I'll be happy to show you
24 whatever you'd like to see.

25 MR. KIRPALANI: It's Movants' Exhibit 2, it's in the

1 big book that you have there.

2 Q. Just so the record is clear, my question is whether or not
3 you learned in any way that the original fed repo transaction
4 included a haircut of four to five billion dollars?

5 A. I'm just looking at this balance sheet to refresh and make
6 sure I got it right. Yes, we knew that when you balance the
7 transaction of roughly seventy-three billion originally, and
8 you take the liabilities in the book, and you add them to what
9 was told to us was the outstanding amount of -- I think the
10 thirty-four and a half was supposed to be the fed repo at the
11 time, that's there's a differential between the sixty-eight and
12 seventy-two which was four billion, and was then made up by the
13 cure and comp. The reason I -- it never came up in the way you
14 said which was did someone tell me there was a haircut in fed
15 repo.

16 But what I realize sitting here I can figure it out. And,
17 yeah, there looks like there was a differential as of whenever
18 this balance sheet was put together.

19 Q. Let me just be sure I understand what you're saying.
20 You're saying that looking at this balance sheet refreshes your
21 recollection that you knew back in September of 2008 that the
22 original fed repo transaction had a haircut of four or five
23 billion dollars, is that correct?

24 A. I have no recollection of a particular conv -- of any
25 specific knowledge as to whether there was or was not a

1 haircut. I do believe that I knew that the fair value of these
2 assets net of the contras was more than the liabilities that
3 Lehman would have to pay off at closing. It just never came up
4 so specifically, sir. So I want to be clear.

5 Q. Right. There's no mention of the fed repo in Movants'
6 Exhibit 2, correct?

7 A. You're right. I'm assuming that the thirty-four and a
8 half is it, but I could be wrong.

9 Q. You're assuming that the thirty-four and a half million
10 dollars is what Lehman got from the fed and owing the fed?

11 A. Sitting here, that's what I'm assuming.

12 Q. Has anyone ever told you that Lehman borrowed forty-five
13 billion dollars from the fed?

14 A. It was never clear to me whether or when -- or this is not
15 as of Friday. I was told that the outstanding balance of the
16 Barclays' repo, which was taken over by from the fed, was
17 forty-five billion at closing. I don't know specifically if
18 the fed drew it up, or someone else drew it up, I don't know.

19 Q. That's my question. My question is you know that there
20 was a fed repo?

21 A. I do.

22 Q. And do you know when the fed repo transaction took place?

23 A. I don't.

24 Q. Do you know that it took place approximately Monday,
25 September 15th?

1 A. I don't know specifically, other than when I walked into
2 the room on Thursday at Weil Gotshal there was such a thing.

3 Q. Did you ever find out when the fed repo transaction
4 originally took place?

5 A. You just told me, sir.

6 Q. Prior to his conversation with me, did you ever find out
7 when the original fed repo transaction took place?

8 A. I don't have a specific recollection of the date when the
9 money was lent, no.

10 Q. Did you ever find out what the amount of the original fed
11 repo transaction was?

12 A. I don't recall.

13 Q. Did you ever find out what the amount of the haircut in
14 the original fed repo transaction was?

15 A. No.

16 Q. Did you ever try to find out?

17 A. No.

18 Q. Using haircut in the sense that you use it in describing
19 the fed rep, is the application of such a haircut the kind of
20 thing that a broker-dealer ordinarily uses in marking the
21 broker-dealer's securities to market?

22 A. It is not in my knowledge typical for a broker dealer to
23 haircut its going concern, market value of its securities, for
24 purposes of marking their books.

25 Q. Let me turn to the next page of the Milbank/Houlihan

1 document, that is the last two pages of Barclays Exhibit 18 --
2 813-B.

3 At the top of the page it says, "The night of the close of
4 the transaction," and this would have been Sunday night,
5 correct, sir?

6 A. Correct.

7 Q. "The night of the close of the transaction we told
8 Lehman/Weil that the pieces of the transaction that were being
9 described to us added up to fifty-two to fifty-three billion
10 dollars, rather than the approximately forty-seven billion
11 dollars that we would describe in court the Friday before."

12 Correct, sir?

13 A. Yes. You're accurately reading the document.

14 Q. And is this a true statement? Did representatives of the
15 committee in fact tell Lehman and Weil Gotshal on Sunday night,
16 September 21st, that the pieces of the transaction that were
17 being described to the committee, added up to fifty-two to
18 fifty-three billion dollars, rather than the approximately
19 forty-seven billion dollars that had been described in Court
20 the Friday before

21 A. As I testified yesterday, I did.

22 Q. And when we talk about the forty-seven billion dollars
23 that had been described in Court before, we're talking about
24 the 47.4 billion dollars that had been described by Lori Fife
25 to the Court, correct?

1 A. Correct.

2 Q. And the committee understood, and you understood, that
3 that 47.4 billion dollars was what Lehman was indicating the
4 value of the fed portfolio securities were, correct?

5 A. No.

6 MR. BOIES: Would you hand out the next binder.

7 Q. I'd like to direct your attention to Barclays' Exhibit 37,
8 which is at Tab 6. And in particular, page 8. This is what is
9 referred to as the limited objection of the creditors'
10 committee that was filed in December, correct?

11 A. Yes.

12 Q. And you've referred to this a number of times, correct?

13 A. Yes.

14 Q. And you read this at the time, correct?

15 A. This document?

16 Q. Yeah.

17 A. Yeah, sure. Yes.

18 Q. And did you participate in its preparation?

19 A. I did.

20 Q. Let me direct your attention to page 8, footnote 2. Where
21 it says, "At the sale hearing the Lehman sellers indicated the
22 value of the fed portfolio securities was 47.4 billion
23 dollars," do you see that?

24 A. I do.

25 Q. And was that your understanding as of December of 2008,

1 when this brief was filed?

2 A. No.

3 Q. Did you ever tell anybody who was working on this brief
4 that they had it wrong here? That's a yes, no, or I don't know
5 question.

6 A. Not before it was filed.

7 Q. Did you tell them afterwards?

8 A. I think it came up later, I don't remember exactly when.

9 Q. Do you remember when it came up?

10 A. Sometime between May and September of last year.

11 Q. Somewhere between May and September of 2009?

12 A. Yeah, about the time when discovery was proceeding and
13 you'll be more active in investigating the transaction, I
14 believe. I don't remember exactly.

15 Q. But you never told anybody back in December that you
16 thought this statement was wrong, did you, sir?

17 A. Again, I didn't catch the mistake until later. The
18 mistake is minor in the sense of -- the mistake is whether or
19 not this includes the box -- the clearance box assets. If you
20 remember my testimony today, yesterday, the 47. -- I wasn't
21 sure when I heard about the clearance back, what Mr. Seery
22 called the hammers. And as they got I believe to roughly those
23 numbers, and going through this and 47.4 just didn't seem to be
24 a big deal.

25 Q. Well, --

1 A. It was forty-five plus the 1.9, it's forty-seven.

2 Q. First, sir, you knew about Barclays getting 1.9 billion
3 dollars of clearance box assets at the time that you had the
4 conversation that you say you did with Mr. Klein, correct?

5 A. Yes.

6 Q. And you worked on this brief, you read it at the time, and
7 the brief here says that you understood -- the committee
8 understood the 47.4 billion dollars was indicating the value of
9 the fed portfolio securities, do you see that?

10 A. It's citing the hearing transcript. I didn't check the
11 reference, and if I made a mistake, I made a mistake. It
12 was -- I focused on my affidavit and on the bullet points. I
13 don't have any explanation for including the box assets or not
14 including the box assets. I mean, footnote 12 of page 8 of the
15 brief.

16 Q. But your testimony is that even though you may not have
17 mentioned it to anybody you knew in December of 2008 that the
18 statement was in your testimony wrong?

19 A. No, I didn't say that. I didn't say I realized in
20 December. I said I had a discussion about it when things
21 became an earnest in connection with the investigation at a
22 2004 examinations. Or maybe even later when it was pointed out
23 by you in my deposition. By your firm in my deposition. I
24 don't have any firm recollection of exactly when this footnote
25 was discussed.

1 Q. Well, let's leave the footnote aside just for a second.
2 In December of 2008, did you believe that at the sale hearing,
3 the Lehman sellers had indicated that the value of the fed
4 portfolio securities was 47.4 billion dollars, did you believe
5 that, sir?

6 A. At the sale hearing, you're asking? Or at the closing?

7 Q. What I'm asking you, sir, is whether in December of 2008
8 you believed that at the sale hearing the Lehman sellers
9 indicated the value of the fed portfolio securities was 47.4
10 billion dollars?

11 A. I had no firm belief one way or the other.

12 Q. All right, sir --

13 A. My belief was that --

14 Q. I'm sorry, what?

15 A. I believe -- I believe that the total value of assets
16 transferred was roughly forty-seven billion, I don't
17 remember --

18 Q. Sir, I'm asking you a specific question.

19 A. I told you, I have no firm belief about that.

20 Q. You have no what?

21 A. I have no firm -- you asked me whether I believed, and I
22 said no, I have no firm belief about that topic.

23 Q. And the topic that we're talking about is the topic of
24 this sentence in the brief?

25 A. I have no --

1 Q. Is that right?

2 A. -- firm belief, whether in December I thought that the
3 Leman estate had represented in Court whether fed portfolio
4 securities were worth 47.4 billion as opposed to what the total
5 value of assets in the book were being traded for. I don't
6 have a firm belief, sir.

7 Q. I'm not asking you what you thought the value of the
8 securities were?

9 A. I understand that. You're asking me whether or not I have
10 a belief of what Lehman represented to the Court were the value
11 of the assets.

12 Q. In other words, Lehman made a statement to the Court. And
13 I'm just trying to get from you what you and the committee
14 understood that statement to mean, do you understand what I'm
15 asking?

16 A. Yes.

17 Q. And in this brief the committee says that it understood
18 that statement to mean that the value of the fed portfolio
19 securities was 47.4 billion dollars, correct?

20 A. I see that in the brief in footnote 12.

21 Q. Okay. And now what I'm asking you is did you share that
22 belief as to what Ms. Fife's statement meant?

23 A. And what I'm saying to you again is I didn't think about
24 it at the time, I don't have a firm recollection of what Ms.
25 Fife's statement meant or didn't mean. I have a firm

1 recollection of what I thought it was at the time, not the
2 construction of Ms. Fife's statement as summarized in Quinn
3 Emanuel's brief. I don't know what more you want me to say.

4 Q. Well, sir, let me approach it this way. Let me ask you to
5 look at your deposition.

6 A. Okay.

7 Q. And this is your deposition that was taken on December
8 17th, 2009.

9 A. So where do I find that, sir?

10 Q. In the book that your counsel gave you.

11 A. Oh, the big book.

12 Q. Behind the tab, hopefully, labeled transcripts.

13 A. The first deposition or the second deposition?

14 Q. It is the very first deposition, is the one taken December
15 17th, 2009.

16 A. Okay. I'll be there in a minute. What page?

17 Q. Let's begin on page 40, and line 18. You'll see that the
18 examiner quotes to you the footnote that we've been talking
19 about where the committee stated in December of 2008, "At the
20 sale hearing the Lehman sellers indicated the value of the fed
21 portfolio securities was forty-seven billion dollars." And
22 you're then asked, "As of the time the statement was made to
23 Judge Peck, you did not have any reason to believe, did you,
24 that this was an inaccurate statement of what the Lehman
25 sellers had indicated?"

1 A. Where are you, sir, what line?

2 Q. At the bottom of page 40, the top of page 41.

3 A. Okay.

4 Q. The questioner tries at line 6 to get a yes or no answer.

5 You respond:

6 "A. I didn't go back and read the whole trial transcript when
7 this was filed, and, therefore, I didn't have a view as to
8 whether this was a direct quote or not of Ms. Fife."

9 Then at line 15:

10 "Q. Did you have any reason to believe this was an inaccurate
11 statement of what she had said?

12 "A. I think it was an accurate description of what we all
13 thought she said."

14 Do you see that, sir?

15 A. I do.

16 Q. And did you give those answers to those questions under
17 oath in December of 2009?

18 A. Did I give these answers under oath, oh, sure, yes. My
19 deposition.

20 Q. And those were truthful and accurate statements at the
21 time, correct, sir?

22 A. It appears I made a mistake in understanding the question,
23 sir.

24 Q. You made a mistake in understanding the question?

25 A. I mean, it looks like --

1 Q. The question says, "Did you have any reason to believe
2 this was an inaccurate statement of what she had said?" And
3 you answer, "I think it was an accurate description of what we
4 all thought she said."

5 A. Mr. --

6 Q. And you think you misunderstood the question, is that your
7 testimony?

8 A. Mr. Boies, this is -- sitting here today, I think I made a
9 mistake in my deposition. I have not seen this since December.
10 I'm reading it now. I gave you my best recollection today.
11 You know and I know from my deposition -- my testimony earlier
12 of exactly what I thought, which was actually was on Friday the
13 checklist I went through with Ms. Fife and what I thought she
14 said.

15 Q. Umm --

16 A. I missed the 47.4 was not including the box assets, then I
17 apologize and I made a mistake in December.

18 Q. Now, in December when this deposition was taken you knew
19 you had a right to go through and correct the transcript,
20 correct?

21 A. I'm not sure if I was actually advised that. I think
22 generally I knew that.

23 Q. You're a lawyer, aren't you?

24 A. I am.

25 Q. Okay. And you knew that a deponent has the right to go

1 through and review their transcript and make corrections,
2 correct?

3 A. I think so.

4 Q. And did you go through this transcript and make
5 corrections?

6 A. I neither went through the transcript, nor made
7 corrections.

8 Q. Is it your testimony that in preparation for your testimony
9 here you didn't read your deposition transcript?

10 A. That is correct, I did not read this transcript since I
11 was deposed. I mean, I've seen snippets of it, but, no. I did
12 not. And to the extent there are differences, that's a
13 mistake. And this one seems fairly innocuous in light of the
14 fact that the numbers were moving around, but, yes.

15 Q. So your testimony is that the footnote in the committee's
16 brief was a mistake. And your testimony under oath in December
17 2009, was simply a mistake?

18 A. I do not know if the footnote was or was not a mistake.
19 Whether it's directly quoting Ms. Fife or not. So I don't know
20 if that references a mistake or not. What I'm telling you is
21 that at that time in December -- at the time of the closing, at
22 the time in December, at the time in May, June, July, August,
23 when this may have been pointed out, at the time of the
24 deposition and at this time my recollection hasn't changed.
25 And if I misspoke I misspoke. Sir, if you let me --

1 Q. Let me make sure I understand what you said.

2 A. If you read my affidavit, if you read the bullet point --

3 Q. There's no pending question, sir.

4 A. -- it's clear what my recollection was at the time.

5 Q. Well, when you say it's clear what your recollection was
6 at the time, is there anywhere in your declaration where you
7 state how you interpreted Ms. Fife's --

8 A. Well, instead of making me guess, sir, why don't we open
9 up the affidavit and read it together, and then I'll tell you
10 whether or not I did or did not.

11 Q. Sir --

12 A. Let's turn to the affidavit, sir --

13 Q. Sir, we will do that if your counsel wants to do it.

14 THE COURT: Mr. Burian, let me just caution you that
15 you're a witness here. You don't control the examination, Mr.
16 Boies does. And then on redirect counsel for the committee
17 will direct questions to you.

18 THE WITNESS: Your Honor, he's asking me to guess
19 about a document before us. Actually have a memory test. I
20 remember what was in my affidavit --

21 THE COURT: Simply answer the questions to the best of
22 your ability.

23 THE WITNESS: Okay. We'll have a memory test.

24 Q. At anytime insofar as you remember as you sit here now --

25 A. Right.

1 Q. -- did you ever give any description of how you
2 interpreted Ms. Fife's representation to the Court, other than
3 the deposition testimony that I've shown you?

4 A. I believe yesterday in my testimony I described at length
5 my understanding at the time that Ms. Fife's description was
6 consistent with, both her quick review prior to the judge
7 taking the bench, and my conversations with Mr. Seery and I
8 think Mr. Shapiro was on the phone at the same time. And which
9 we went through the before and after checklist of what had
10 changed in the transaction.

11 Q. At the time of the sale hearing, and Ms. Fife spoke to the
12 Court, did you have at that point, on September 19th, an
13 estimate of what the value of the fed repo securities were?

14 A. Only in the context of an estimate of the total assets
15 being transferred to Barclays. So not specifically these
16 assets are worth X, this is worth Y. I think -- I don't -- did
17 I have an estimate at the time? Yeah, yeah. I think in the
18 notes -- in fact, in my notes before I had forty-five plus 1.9.
19 So, yeah, it was basically somewhere around forty-five billion
20 dollars.

21 I think as I told you, I believe that on Friday Mr. Seery
22 did tell me about the hammers, the box assets, the clearance
23 box. And, therefore, the only conclusion one could have
24 reached is that the repo assets had deteriorated in value to
25 around forty-five.

1 Q. When did you have this conversation with Mr. Seery?

2 A. As I testified yesterday there were a number of
3 conversations, one long one, one shorter one.

4 Q. When did you have the conversation with Mr. Seery, in
5 which he told you according to your testimony about the nails
6 and --

7 A. Hammers. We would have to go back to my notes as to
8 whether it was the first conversation, the second conversation.
9 It was that Friday morning, early afternoon, before the
10 hearing.

11 Q. And when did you first come to the conclusion that as part
12 of this transaction Barclays was acquiring clearance box assets
13 worth an estimated 1.9 billion dollars?

14 A. I never came to that conclusion, it's what I was
15 represented and trusted to be verified later.

16 Q. That's what you were told?

17 A. Correct.

18 Q. And did you believe it?

19 A. Yes.

20 Q. Did you have any reason to disbelieve?

21 A. Now, I do.

22 Q. When did you first have any reason to disbelieve the
23 assertion that Barclays was getting 1.9 billion dollars in
24 clearance box assets?

25 A. When did I first have a reason to disbelieve? When the

1 deal closed --

2 Q. Sir, the question's when?

3 A. I'm trying my best to recollect. I had no reason to
4 disbelieve in particular the valuation of the clearance box
5 assets, other than in the context of trying to verify the total
6 amount of assets. I, frankly, didn't worry that much about the
7 clearance box assets, I didn't disbelieve that. At the time I
8 was more focused on the repo transaction assets. And I don't
9 know.

10 Q. I'm not asking what you worried about, sir, okay. What
11 I'm asking you is when was the first time, if ever, you had any
12 reason to disbelieve the assertion that you say was made to
13 you, that Barclays was getting 1.9 billion dollars in clearance
14 box assets?

15 A. With respect to those particular assets, I do not recall.

16 Q. Approximately when?

17 A. With respect to those particular assets, I do not recall.

18 Q. Do you recall whether it was in 2008?

19 A. With respect to those particular assets, I do not recall.

20 Q. Do you recall whether it was in the first half of 2009?

21 A. With respect to those particular assets, I do not recall.

22 Q. Let me go back to the Milbank/Houlihan document, dated
23 October 10, 2008. And go to the second page, second paragraph.
24 This is Barclays' Exhibit 18 -- 813-B. And the first paragraph
25 talks about an asset difference of five or six billion dollars

1 that you had, or Houlihan or the committee had raised with
2 Lehman and Weil Gotshal the night of the close of the
3 transaction. And we've talked about that. And then it goes on
4 to say, "A few hours after we raised the issue Lehman came in
5 and got us and sat down to try to show us how things added up.
6 We were told that some of the marks shown on Schedule A, were
7 'out of date' and that the parties, Lehman and Barclays, had
8 agreed to a five billion dollar discount, as the appropriate
9 mark-to-market adjustment for the securities." Do you see
10 that?

11 A. I do.

12 Q. First, were you present when Lehman came in, got you and
13 sat you down to try to show you how things added up?

14 A. Mr. Geer is referring to my description of the Michael
15 Klein meeting, which I explained earlier how that happened. So
16 if you're asking me was there a meeting which Lehman came and
17 got us and sat us down, no, there was no such meeting.

18 Q. Well, sir, you say Mr. Geer was referring to this. To
19 begin with this is something that was written by, both Mr. Geer
20 and by Milbank, and not by you, correct?

21 A. I do not believe that this paragraph was written by
22 Milbank, sir. It's an internal summary preparing Milbank to
23 push Weil harder to get information in giving a Layman's quick
24 explanation of what -- of Mr. Geer's recollection of what
25 happened.

1 Q. Did you ever have any discussions with Mr. Geer or with
2 Milbank about who wrote what portions of this document?

3 A. I did.

4 Q. And when did you do that?

5 A. It must have been when the discovery binders showed up on
6 my desk.

7 Q. What discovery binders?

8 A. The Houlihan e-mails. We got a subpoena or something, we
9 were told to produce e-mails. At my direction a paralegal
10 produced e-mails. There were discussions about parameters and
11 searches, and we spent a lot of time on this. And at some
12 point all sorts of things got dumped on my desk.

13 Q. And this would have been after discovery had started in
14 this proceeding, correct?

15 A. Yes.

16 Q. Okay. And who told you what portions of this were written
17 by Milbank, and what portions were written by Mr. Geer, or
18 Houlihan?

19 A. I don't remember if it was clearly discussed explicitly or
20 it just very, very clear from the context since we were there
21 having these conversations and Milbank wasn't. So -- but it
22 would have only come from a conversation between me and Mr.
23 Geer. Or, again, it's pretty clear from the context that this
24 is not Milbank.

25 Q. Sir, everybody can read the document for themselves. I'm

1 simply asking you what you were told. And did anybody ever
2 tell you what portions of this document were written by Milbank
3 and what portions of the document were written by people from
4 Houlihan?

5 A. I don't specifically recall why the foundation for my
6 belief that these paragraphs describing that evening were by
7 Brad Geer.

8 Q. Is that a no to my question?

9 A. It's an I don't know. It's I don't specifically recall
10 how I know this or believe it to be true.

11 Q. Now, there's no reference in here to Barclays telling you
12 anything, correct?

13 A. That is correct.

14 Q. Now, in the second sentence here it says, "We were told
15 that some of the marks shown on Schedule A were out of date.
16 And that the parties, Lehman and Barclays, had agreed to a five
17 billion dollar discount." Do you see that?

18 A. Well, let's read the rest of it.

19 Q. I did, before. "As appropriate" --

20 A. "As the appropriate mark-to-market adjustment for the
21 securities."

22 Q. And --

23 A. That is a --

24 Q. Was Houlihan and the committee told on Sunday night that
25 Lehman and Barclays had agreed to a five billion dollar

1 discount as the appropriate mark-to-market adjustment for the
2 securities, that Barclays was acquiring? That's yes, no, or I
3 don't know.

4 A. It depends on how you define the word discount. So it's a
5 yes, with an explanation.

6 Q. Well, first of all, were Houlihan or the committee told
7 that Lehman and Barclays had agreed to a five billion dollar
8 discount, using the word discount?

9 A. No.

10 Q. Was Houlihan and the committee told that Lehman and
11 Barclays had agreed to a five billion dollar reduction as the
12 appropriate mark-to-market adjustment for the securities that
13 Barclays was acquiring?

14 A. Yes. We were told that market values had dropped, and the
15 appropriate mark-to-market valuation of the securities being
16 transferred, not including the clearance box, but including the
17 resis was forty-four to forty-five billion was being rounded up
18 to forty-five billion. Which -- and this is math we were
19 competent in doing, we understood was five billion less than
20 the fifty billion on the page that we had received Sunday
21 afternoon.

22 Q. Let me be sure I've got your testimony. You testified
23 that you were not told that Lehman and Barclays had agreed to a
24 five billion dollar discount, using the word discount as the
25 appropriate mark-to-market adjustment for the securities

1 Barclays was acquiring, correct?

2 A. Correct.

3 Q. My question now is were you told that Lehman and Barclays
4 had agreed to a five billion dollar reduction as the
5 appropriate mark-to-market adjustment for the securities?

6 A. We're having a problem, Mr. Boies, because in common usage
7 when I think of discount, you go to a store you buy a shirt,
8 it's a very nice shirt, it's worth twenty bucks. You get it
9 for eighteen dollars, hey, I got a discount.

10 Q. Do you understand the question, sir?

11 A. No. Because I'm trying for you to please be more
12 particular as to what you mean by discount or reduction.

13 Q. I didn't use the word discount in my last question. I
14 said reduction. Do you understand what reduction means?

15 A. I'm trying to define it with particularity, but you're not
16 letting me.

17 Q. Let me try to define reduction as the lowering of the
18 amount, the reducing of the amount.

19 A. As compared to what, sir?

20 Q. As compared to a prior amount. Okay. And I'm asking you
21 were you told on Sunday night that Lehman and Barclays had
22 agreed to reduce, bring down, lower, the mark by about five
23 billion dollars?

24 A. As compared to what? Which mark are you referring to?

25 Q. As it compared to what it had been?

1 A. At what date?

2 Q. Well, let me ask you that question, sir.

3 A. Well, that's exactly what I've been saying, sir.

4 Q. No.

5 A. Yes. It's exactly what I've been saying. Which is --

6 Q. Mr. Burian, what question are you answering?

7 A. I'm answering your question as to whether or not I was
8 told there was a reduction in the value of the securities as of
9 a mark of a date that you have not defined. And I am telling
10 you exactly -- you have it exactly right, Mr. Boies.

11 Q. And my question to you --

12 A. I'm answering the question.

13 Q. No, I don't think you are, sir. And with respect --

14 A. I finally got a question I could answer, now you don't
15 want the answer. I finally got the question right.

16 Q. Sir --

17 A. And now I want to answer it

18 Q. Have you finished?

19 A. I want to answer the question first.

20 Q. Okay. Tell me the question you're answering?

21 A. Whether or not I was told that there was a five billion
22 dollar reduction in the value of the securities as of a mark of
23 a date that you're not sure of.

24 Q. Okay, now the answer to that question --

25 A. That one I can answer.

1 Q. The answer to that question begins yes, no, or I don't
2 know?

3 A. Yes.

4 Q. Okay. Now, when were you told that?

5 A. By Mr. Klein in the meeting early Monday morning.

6 Q. Okay. Now, we will agree that if you're talking about a
7 reduction or lowering, as you just said, there is a prior
8 amount and then a subsequent amount, correct?

9 A. Correct.

10 Q. And the subsequent amount is lower than the prior amount,
11 correct?

12 A. You said if?

13 Q. I said it is. That's what you were told. You were
14 told --

15 A. Correct. Correct.

16 Q. Okay. So that you had one value and then you had a second
17 lower value, correct?

18 A. Correct.

19 Q. And the first higher value was for, you were told, an
20 earlier point in time, correct?

21 A. Correct.

22 Q. And the second lower value was for a later point in time,
23 you were told, correct?

24 A. Correct.

25 Q. And the difference between the higher value and the lower

1 value was about five billion dollars, you were told, correct?

2 A. Correct.

3 Q. And you were told that the difference between the higher
4 value and the lower value of about five billion dollars was a
5 difference that Lehman and Barclays had agreed to, correct,
6 sir?

7 A. It wasn't expressed that way. Not exactly right. Close,
8 but not exactly right.

9 Q. Well, when --

10 A. It wasn't --

11 Q. It's written here, sir, that Lehman and Barclays had
12 agreed to a five billion dollar discount as the appropriate
13 mark-to-market adjustment for the securities, and you say, you
14 don't like discount, you don't know what reduction means, but
15 you know what lowering means. And it's lowered down. It's
16 clear that whatever had happened it was something that Lehman
17 and Barclays had agreed to, correct?

18 A. Barclays and Lehman had agreed the fair market value of
19 the assets on that date was forty-five billion. My
20 recollection is not that they agreed on an amount to the
21 discount. It happened to be that because at one point in time
22 it was embarked at fifty billion and now it was forty-four to
23 forty-five billion, rounded up to forty-five, you are pointing
24 out the difference. But you're implying in your questions that
25 I know what they negotiated a discount. And that is not my

1 testimony, and not what I believe was told, and not what I
2 believed at the time. So we can go back and forth on words,
3 but I stay very, very clear what I was told and what I
4 believed.

5 Q. I'm focusing right now on what you were told. And
6 assuming that we changed the word discount to some word that
7 you're more comfortable with that means generically the same
8 thing. Are you saying that this statement in the Milbank
9 Houlihan document is right or wrong?

10 A. As long as we understand discount not to be a discount to
11 value, but a reduction from a previous higher number, at some
12 indeterminate time, then the answer is of course it's right.

13 Q. Okay. Now, let me focus on the indeterminate time. It is
14 your testimony that you were told that there was a fifty
15 billion dollar number, and rounded forty-five billion dollar
16 number. And the fifty billion dollar number was from an
17 earlier point in time -- an indeterminate point of time, but
18 outdated, correct?

19 A. Both, the number and the corpus of securities, were
20 outdated, correct.

21 Q. Let me focus on that. How much of the reduction from
22 fifty billion dollars to forty-five billion dollars, as you
23 understood it, was a result of the value changing, not the
24 result of securities being taken out, but of the value
25 changing?

1 A. I didn't know. I did not know at the time.

2 Q. Did you try to find out?

3 A. Later we tried to find out. At the time, no.

4 Q. Okay. And by later -- when you say later we tried to find
5 out, when do you mean later?

6 A. The whole process of seeking reconciliation, of exactly
7 what went at what marks at what values.

8 Q. Let me ask you this. When was the first time that you
9 ever asked Barclays how much of the reduction that you say was
10 made from fifty to forty-five billion dollars was due to a
11 change in valuation?

12 A. I never specifically asked Barclays to parse the
13 difference between the premark and the postmark in categories
14 of securities that did not show up as compared to market
15 deterioration. We figured we could figure that one out on our
16 own when we got the full list of assets and their marks of what
17 was actually transferred.

18 Q. Just to be clear, what you're saying is the reduction in
19 value, from fifty billion to forty-five billion, was as you
20 understood it, in part due to some securities no longer being
21 there, and in part due to a deterioration of prices, correct?

22 A. Correct. Mr. Klein said market value of what we're
23 getting --

24 Q. I'm not asking you what Mr. Klein said, I'm asking what
25 your understanding was?

1 A. My understanding was it could very well have been a
2 combination of both of those but without any firm knowledge of
3 whether it was the former, latter, or both.

4 Q. Did you believe that it was in part due to some of the
5 fifty billion dollar assets no longer being there, and in part
6 due to a deterioration in the value of the assets that
7 remained?

8 A. At the time I suspected as much.

9 Q. And at the time, before the closing, did you ever make any
10 effort to find out how much of the difference was attributable
11 to assets disappearing and how much was attributable to the
12 prices of the assets that remained declining?

13 A. Yes.

14 Q. And did you ask somebody that?

15 A. We did.

16 Q. Who did you ask?

17 A. As I testified yesterday, Mr. Fazio, he immediately jumped
18 in after I clarified the resi issue. He said wait a minute I
19 want to talk about the what went down, government securities,
20 which is the first half of understanding what portion would be
21 market decline, what portion would be assets not showing up.
22 And as I testified yesterday, it was Mr. Miller cut him off and
23 said you got your explanation and ended the meeting.

24 Q. And did you ever -- prior to this proceeding, did you ever
25 complain to the Court that Mr. Miller was cutting you off and

100

1 not giving you information that you thought was important?

2 A. Just so I understand the question, Mr. Boies --

3 Q. The question is yes, no, I don't --

4 A. Are you asking me whether I came running into Judge Peck
5 and asked him whether or not Mr. Miller was being informative
6 or nice to me?

7 Q. No, I didn't ask that at all, sir. My question was
8 whether at anytime prior to this proceeding you ever complained
9 to the Court that Mr. Miller was cutting you off and not giving
10 you information that you thought was important? That's my
11 question. And I'd like you to begin with yes, no, I don't
12 know.

13 A. I never came to Court to complain that Mr. Miller had cut
14 off a conversation about the closing.

15 Q. Did you ever come to Court to complain to the Court or to
16 tell the Court that Mr. Miller was not permitting you to get
17 information that you thought was important?

18 A. I --

19 Q. Again, a yes, no, or I don't know.

20 A. Yes, with an explanation, Mr. Boies. The explanation
21 is --

22 Q. Wait, wait, wait a minute. I want to be sure I got the
23 question.

24 A. Whether I ran to Court --

25 Q. Did you ever come to Court to complain to the Court, or to

1 tell the Court Mr. Miller was not permitting you to get
2 information that you thought was important? And your answer is
3 yes with an explanation, is that correct?

4 A. Correct. To the extent you view Mr. Miller as
5 representing a Lehman estate, and to the extent that we came in
6 December to complain very loudly that we were not getting
7 information we need to do our reconciliation, that would be a
8 reflection on Mr. Miller.

9 Q. And the first time you did that was in December, is that
10 your testimony?

11 A. The first time we came to Court was in December, yes, sir.

12 Q. Let me go to the next paragraph. Where it says, "Lehman
13 wasn't able to provide detail as to which securities on
14 Schedule A led to the five billion dollar adjustment." You see
15 that?

16 A. I do, sir.

17 Q. And is adjustment a term that you're comfortable using in
18 connection with what happened?

19 A. Yes, I am.

20 Q. Okay.

21 A. It's an adjustment to reflect market value at the time.

22 Q. Okay. And -- and let me try to use the word adjustment.
23 And you will agree that the five billion dollar adjustment was
24 a five billion dollar downward adjustment, correct?

25 A. With all the qualifications we've been talking about, yes.

1 Q. Okay. Now, was it your understanding that Lehman and
2 Barclays had agreed to a five billion dollar downward
3 adjustment from one set of values to a second set of values?

4 A. At different times, yes.

5 Q. And by at different times, yes, do you mean that the
6 valuations were at different times?

7 A. Correct. As of different dates.

8 Q. So that the fifty billion dollar valuation was at a
9 different time than the forty-five billion dollar valuation?

10 A. That's what we understood and were told.

11 Q. Okay. Did you ever prior to closing, have any
12 understanding as to how long the negotiation process between
13 Lehman and Barclays had gone on in order to agree to this five
14 billion dollar downward adjustment?

15 A. Nope.

16 Q. This sentence goes on to say that Lehman was also not able
17 to tell you who at Lehman actually agreed to the adjustment,
18 and they simply said various traders. You see that?

19 A. I do.

20 Q. Now, were you aware that Barclays' traders and Lehman
21 traders were negotiating over the course of the week of
22 September 15th in order to try to adjust what had been the
23 Lehman marks for securities?

24 A. I suspected as much, was not specifically told.

25 Q. And when you say you suspected as much, you mean you

1 suspected as much during that week prior to closing, is that
2 correct?

3 A. Yes.

4 Q. Now, going down to the third paragraph from the bottom, it
5 says, "The marks for the remaining assets in the Lehman
6 estate," and just for context, this is the remaining assets
7 other than government agencies and treasuries, correct, sir?

8 A. What he means by remaining assets in the Lehman estate is
9 other than the assets taken by Barclays, the assets that we
10 have been in charge of trying to maximize value together with
11 the debtor estates.

12 Q. All right, that's a helpful clarification.

13 A. You're welcome.

14 Q. So the reference here for the marks for remaining assets
15 mean the assets in the Lehman estate that Barclays did not
16 acquire?

17 A. That's what I just said, sir.

18 Q. Yeah. And you say that those marks appear to be
19 reasonably good and up to date, do you see that?

20 A. I do, sir.

21 Q. And by reasonably good and up to date, do you mean that
22 the marks as of October were approximately the same as the
23 marks had been on September 12th?

24 A. No.

25 Q. Do you mean that the marks as of October were

1 approximately the same as they had been on September 22nd?

2 A. No.

3 Q. Were the marks for Lehman's remaining assets, that is the
4 assets that remained in Lehman's estate, as of October 10,
5 materially lower than the marks on those same assets as of
6 September 12th?

7 A. I don't know.

8 Q. Same question with respect to September 22nd?

9 A. I don't know. It's not what this paragraph's referring
10 to.

11 Q. I'm not asking what the paragraph's referring to, I'm
12 asking for your knowledge.

13 A. Okay. I don't know.

14 Q. The next sentence it says, "The story that we were given
15 the night of the close that some of the marks on Schedule A
16 were 'out of date' and needed to be written down five billion
17 dollars is implausible," do you see that?

18 A. I do.

19 Q. And as you understand it was the sentence that we're just
20 referring to here a sentence that was written by Milbank or by
21 Houlihan?

22 A. Houlihan.

23 Q. And that was part of the additions that was made by
24 Houlihan to what Milbank had originally drafted, is that
25 correct?

1 A. I believe so.

2 Q. And then the completed document was according to your
3 understanding sent back to Milbank?

4 A. That's what this e-mail is I believe, it's an e-mail from
5 Brad Geer sending this crib sheet to Milbank so they could be
6 better prepared to push harder on Weil who had not yet been
7 responsive to our requests.

8 Q. And this was done on October 10, 2008, correct, sir?

9 A. The e-mail was sent on October 10th, the document is dated
10 October 10th, sir.

11 Q. the e-mail was sent first by Milbank to Houlihan on
12 October 10th, changes were made and then the document was sent
13 back by Houlihan to Milbank again on October 10th, correct?

14 A. That's what the first page says.

15 Q. And you don't have any reason to doubt that, do you, sir?

16 A. Nope.

17 Q. Let me go to the next paragraph. And particularly let me
18 separate that between cure and comp. The first part of this
19 paragraph says, "With respect to the 2.5 billion dollar cure
20 liability that Barclays assumed, and which Lehman gave Barclays
21 securities in the list above to cover the payment of there is
22 still no list summarizing what cure assumptions could lead to
23 anything even close to this type of cure payments. The only
24 potential cure payment that we've seen was a 25.5 million
25 prepetition payable associated with the assumption of a

1 services contract with the Indian Servicing Operations," do you
2 see that?

3 A. I do.

4 Q. And this was written by Houlihan to Milbank Tweed on
5 October 10, 2008, correct?

6 A. I believe so.

7 Q. And then the next sentence says, "A similar argument could
8 be made for the two billion employee compensation liability.
9 There's no way it's that high." Do you see that?

10 A. I do.

11 Q. And that, too, was written by Houlihan and Milbank Tweed
12 on October 10th, 2008, correct?

13 A. Yes, sir. The whole paragraph appears to be from Houlihan
14 to Milbank on October 10th, 2008.

15 Q. And let me go to the very last sentence of this document.
16 It says, "It appears that the assets transferred were
17 significantly greater and liabilities assumed significantly
18 less than the figures represented in Court by at least a few
19 billion dollars in each case," do you see that?

20 A. I do.

21 Q. And this, too, was written by Houlihan to Milbank Tweed on
22 October 10th, 2008, correct, sir?

23 A. Correct.

24 Q. Let me ask you to turn next to Barclays' Exhibit 814.
25 This is an e-mail and it's Tab 36 in your book.

1 A. Thank you.

2 Q. This is an e-mail dated December 21, 2008 from Brad Geer
3 to James Tecce with a copy to Michael Fazio, correct?

4 A. Yes.

5 Q. Have you seen this document before?

6 A. Yes, it was shown to me -- the last time I saw it was at
7 my deposition.

8 Q. When was the first time you saw it?

9 A. I don't have any firm recollection.

10 Q. Had you ever seen it prior to your deposition?

11 A. Again, I think it may have been in the binder of e-mails
12 collected by paralegals. I don't remember specifically
13 reviewing it.

14 Q. Did you ever review it before the discovery in this
15 proceeding?

16 A. I don't think so.

17 Q. The e-mail begins, "The primary issue that we're trying to
18 get to the bottom of is that we believe the securities that
19 were transferred to BarCap were worth five billion dollars more
20 than both the Lehman and BarCap guys said they were worth when
21 the securities were transferred. It's not so much that we
22 think their value change during the week, that the deal was
23 being done, but the Lehman guys in cahoots with their soon to
24 be bosses, partners in BarCap negotiated a sweetheart deal that
25 camouflaged the amount and value of securities that were to be

1 transferred. We first uncovered this the Sunday night after
2 the hearing when Weil/Lehman presented draft versions of the
3 clarifying letter Schedules A and B," do you see that, sir?

4 A. I do.

5 Q. Now, recognizing that you didn't write that, and you say
6 you'd never saw it prior to your deposition, or at least
7 discovery in this matter, let me merely ask you whether after
8 seeing this you ever wrote Mr. Geer or Mr. Tecce or Mr. Fazio
9 saying that you believed that what Mr. Geer said here was not
10 true?

11 A. No, I never wrote that what Mr. Geer said was untrue.

12 Q. Or inaccurate? Did you ever write it was inaccurate?

13 A. I think it's inarticulate, I don't think it's inaccurate.

14 Q. Okay. That was going to be my next question, is what you
15 believe. And I take it you believe it's not inaccurate, but
16 it's inarticulate, is that correct?

17 A. Yes. He's using --

18 Q. I'm not asking you what he's using, I'm asking just for
19 what you -- your view is of what he has said?

20 A. I was trying to give you my views of what he said, sir.

21 Q. And your view of what he has said is that it's not
22 inaccurate, although it's inarticulate, is that what your
23 belief is?

24 A. To the extent --

25 Q. Please begin yes, no, or I don't know.

1 A. Yes, with an explanation that I think he is expressing
2 this in a conclusory matter that in December I would not have
3 been comfortable as a representative of Houlihan. I also think
4 that he's using, you know, layman terms for the events that I
5 described over the last two days. For instance, when he says
6 uncovered, what he's referring to is we got the drafts and we
7 saw the differential and we sought to find out the differences
8 and got an explanation, as you know, we know longer believe.

9 A. Did you ever have any conversations with Mr. Geer about
10 what he meant by this?

11 A. Yes.

12 Q. When was the first such time?

13 A. I'm trying to remember exactly when.

14 Q. Approximately when, sir?

15 A. Yeah. Sometime before my second deposition.

16 Q. That is after your first deposition?

17 A. Correct.

18 Q. Let me ask you to turn to a document that has been marked
19 as Exhibit 838, as behind Tab 33.

20 A. In your book?

21 Q. In my book.

22 A. Okay.

23 Q. And is this a document you've seen before?

24 A. I don't recollect seeing this before, no.

25 Q. Do you recognize either the author or the addressees?

1 A. I know who Sam Star and Connor Tully are. I do not know
2 who Jintay Kim is.

3 Q. Well, Samuel Star and Connor Tully are the addressees of
4 this, correct?

5 A. Correct.

6 Q. And who are they?

7 A. They are employees at FTI Consulting.

8 Q. And FTI Consulting is one of the committee's
9 professionals, is that correct?

10 A. Yes.

11 Q. And are you working with FTI, jointly representing the
12 committee?

13 A. Yes. We have different responsibilities, but we are
14 working together to represent the committee.

15 Q. You share information?

16 A. We do.

17 Q. Let me ask you to look at the last sentence of this
18 document. And this is sent to FTI, a representative, on
19 October 9, 2008, correct?

20 A. That's what the e-mail says, I don't know what time zone
21 this person is and whether it's 8th, 9th or 10th.

22 Q. The last paragraph says, and this is a quote
23 attributable -- or attributed here to Barclays chief executive,
24 John Varley, correct?

25 A. Starting on the second page? Oh, there it is. Not the

1 last paragraph of the document, the last paragraph of the quote
2 from some article?

3 Q. Yes, do you see that?

4 A. I see on the screen now, yes, sir.

5 Q. And the quote that's attributed to Mr. Varley on October
6 9, 2008 is, "If you look at the balance sheet that we have
7 acquired, we have acquired net assets of about four billion
8 dollars for 250 million dollars. And included in the growth
9 assets for these liabilities which are netted to get to the
10 four billion dollars is the assumption of a bonus pool for
11 Lehman," do you see that?

12 A. I do.

13 Q. Did anyone tell you on or about October 9, 2008 that
14 Barclays had made this statement?

15 A. It does not look familiar at all to me. And, frankly, I'm
16 not even sure what he's talking about.

17 Q. That is even if somebody had shown you this, it is your
18 testimony you wouldn't have known what he was talking about, is
19 that correct?

20 A. If you look at the balance sheet --

21 Q. That's yes, no, or I don't know.

22 A. Sir, I'm reading it to make sure I can answer your
23 question accurately.

24 Q. Okay.

25 A. Do you want me to close my eyes and answer as if I, you

1 know, make up what it says?

2 Q. No.

3 A. So let me read it for a second.

4 Q. And I don't mean this with any sense of disrespect, sir.

5 A. Then don't say it then, because usually that precedes a
6 negative comment.

7 Q. No. It may be interpreted that way, but I don't mean it
8 that way.

9 A. Oh.

10 Q. It's not close your eyes, I do want you to read it. But I
11 want you not to talk except to respond to the question. Do you
12 understand the difference?

13 THE COURT: And that's actually the rule of the game
14 for every witness.

15 THE WITNESS: Okay.

16 THE COURT: It's not limited to you, Mr. Burian.

17 THE WITNESS: Yes.

18 THE COURT: That's how it works here.

19 (Pause)

20 A. I've now read it, sir, if you'd like to ask me a question,
21 I'll try to answer you.

22 Q. Okay. Well, let me go back and ask the preliminary
23 question that I asked before, just to be sure that your answer
24 is the same. Am I correct that you do not recall being aware
25 of this in words or in substance, as of about October 9, 2008?

1 A. That is correct.

2 Q. If you had been aware of this as of October 9, 2008, would
3 you have had some understanding of what Mr. Varley was talking
4 about?

5 A. No.

6 Q. It would simply be confusing to you, is that your
7 testimony?

8 A. I am not familiar with -- yes, I'm not familiar with the
9 accounting treatment of these items, and honestly do not know
10 what this really means.

11 Q. Okay.

12 MR. BOIES: Your Honor, we're at our traditional
13 breaking period. I have, I think about another ten minutes.
14 But my predictions of how quickly I go with this witness has
15 not been accurate.

16 THE COURT: My suggestion is even though we are at a
17 traditional breaking point that we push on and conclude with
18 the cross-examination of the witness, then break for lunch.
19 And I'm thinking it's going to be a short lunch today.
20 Shortened by the length of your examination.

21 MR. BOIES: Yes. Anything would be, Your Honor.

22 Q. Let me ask you to look at Exhibit 144, Tab 27.

23 A. Tab 27?

24 Q. Uh-huh. Are these -- is this a document you've seen
25 before, sir?

1 A. No, sir.

2 Q. You've never seen this?

3 A. I don't think so, no. Can we make it a little larger,
4 sir?

5 (Pause)

6 A. I've never seen this before, sir.

7 Q. Okay. Let me pass that.

8 A. Can I see the bottom of it?

9 Q. It's in your book.

10 A. I know, but it's small, sir. I mean, if you want to lend
11 me your glasses I'll read it. No, sir, I've never saw this
12 before.

13 Q. You've never seen that document before, okay?

14 A. I don't recall ever seeing the document before.

15 Q. Okay.

16 A. To be careful.

17 Q. To the best of your recollection you have never seen that
18 document before, correct?

19 A. That is correct.

20 Q. Okay. Let me ask you to look at Barclays' Exhibit 16-A,
21 which is Tab 30.

22 (Pause)

23 Q. Have you ever seen this document before?

24 A. I do not believe -- to the best of my recollection I have
25 never seen this document before.

1 Q. Are you familiar with a Mary Korycki, and I may be
2 pronouncing her name wrong?

3 A. A who?

4 Q. Mary Korycki, K-O-R-Y-C-K-I.

5 A. No.

6 Q. All right.

7 A. Can you help me? Do you know what firm she's with, is she
8 with my firm maybe?

9 Q. If you don't know her, sir, you don't know here.

10 A. Mary Korycki?

11 Q. K-O -- I want to just spell it out because I want to be
12 sure my pronunciation is not giving you some way of avoiding
13 the question. But it's K-O-R-Y-C-K-I. Korycki. My belief is
14 she works with Alvarez & Marsal. But my belief is irrelevant.
15 I say that just to refresh your recollection.

16 A. Well, you made me less nervous I thought I was being -- I
17 thought it was maybe some analyst that worked for me and I
18 didn't remember their name, I'd be embarrassed when I got back
19 to the office.

20 Q. My question is not to embarrass you, but just to see if
21 you've ever seen these notes or had any conversations with this
22 person?

23 A. To the best of my knowledge and recollection, I've never
24 seen these notes and certainly never spoken to Mary about them.

25 MR. BOIES: Your Honor, I have no more questions.

1 THE COURT: All right. We'll break until -- let's try
2 to get back, if we can, a little before 2 o'clock today.
3 Because I think we need the extra time. So the lunch will be
4 shortened not only by the examination of Mr. Boies that
5 extended past 12:30, but by our coming back a little bit early.
6 Let's start at say ten to 2.

7 Do you have --

8 UNIDENTIFIED SPEAKER: Your Honor, may we approach on
9 a scheduling question before you adjourn?

10 THE COURT: A sidebar?

11 UNIDENTIFIED SPEAKER: Yes.

12 THE COURT: We hardly ever do those here, that's
13 great. Sure.

14 (Recess from 12:36 p.m. until 1:55 p.m.)

15 THE COURT: Be seated, please. You may proceed.

16 MR. KIRPALANI: Thank you, Your Honor. For the record
17 Susheel Kirpalani for the creditors' committee.

18 REDIRECT EXAMINATION

19 BY MR. KIRPALANI:

20 Q. Mr. Burian, you were asked on cross-examination about
21 certain press releases and Q&A printouts from Barclays, do you
22 recall those questions generally?

23 A. I do.

24 Q. Okay. How reliable and informative did you consider the
25 press releases as to the economic substance of the deal as

1 compared with your in person meeting with Mr. Klein and Mr.
2 Miller?

3 A. Viewed them as being mostly irrelevant. Didn't understand
4 and didn't think the accounting treatment was relevant to true
5 economic gain. And relied directly on the representations of
6 the people that were working on the transaction, explaining the
7 transaction, the context of what it meant to Lehman Brothers,
8 as opposed to U.K. accounting conventions of some sort.

9 Q. You also testified or you asked questions by Mr. Boies
10 about your belief that Barclays would realize overall economic
11 gain from this transaction, do you recall those questions?

12 A. I do.

13 Q. Okay. Did you think the overall gain was associated with
14 buying the Lehman Brothers broker-dealer franchise for 250
15 million dollars?

16 A. I did. I --

17 Q. Did you have any belief that all or part of that gain was
18 attributable to acquiring the trading book, including the
19 associated liabilities for less than fair market value?

20 A. At the time of the closing my understanding was that they
21 were not going to have a gain in the trading book. Obviously
22 earlier in the week, the 6872 deal, depending on the amount of
23 cure and comp, there might have been some profit in the trading
24 book. By the time that I left Weil Gotshal that morning I did
25 not think that the assets were being purchased for anything

1 other than fair market value in the manner that a broker-dealer
2 would mark their books.

3 Q. Is this dispute about Barclays having made overall
4 economic profits from the transaction?

5 A. Not from my perspective.

6 Q. Okay. You were asked a few questions that I need to
7 put -- I'll ask you to look and put on the screen, Movants'
8 Exhibit 3, for us, in context. But you were asked about
9 whether the clarification letter, whether it did or didn't take
10 out all references in the APA to book value, do you remember
11 that line of questions?

12 A. I do.

13 MR. KIRPALANI: If we could just highlight the -- I
14 guess it's (ii) on the bottom there, if you can expand that.

15 Q. Do you see the language that says, "Instead of the items,"
16 in the second line there, after in the original agreement,
17 "Instead of the items referred to in such clauses," and then
18 the next thing -- that it basically refers the parties now to
19 securities owned by LBI and transferred to purchaser or its
20 affiliates under the Barclays repurchase agreement as specified
21 on Schedule A previously delivered by seller, and accepted by
22 purchaser." You see that language?

23 A. I do.

24 MR. KIRPALANI: And if we can also put up -- you can
25 take this down. You can put up Movants' Trial Exhibit 394.

1 Q. This is the e-mail that Weil Gotshal sent to Milbank that
2 we asked you about yesterday that attaches the not necessarily
3 final, but some version of Schedule A. And if you can take a
4 look at the attachment, I believe it's the second page in, do
5 you see any references in this Schedule A to the use of
6 liquidation value as opposed to book value?

7 A. No, it's consistent with everything we've always seen from
8 Lehman. It's their marking of the book at market value in a
9 way that every single U.S. broker-dealer does.

10 Q. And putting aside that, we understand your testimony from
11 yesterday that the numbers may not be right, as of a particular
12 date, and you weren't sure what date, all of the reams of paper
13 behind this schedule, which are in the hard copy there, did
14 they reference liquidation value?

15 A. No.

16 Q. Did they use the word market value on every single line
17 item and every single page?

18 A. I would have to go back and check, but I believe so.

19 Q. Okay. The last topic I wanted to ask you about is, you
20 were asked a series of questions by Mr. Boies about when
21 exactly you first thought of suing Barclays for this
22 transaction, you remember that line of questioning?

23 A. I do.

24 Q. Okay. During the period from the closing through December
25 of 2008 did you, meaning Houlihan or the committee, ever

1 consider suing Barclays under the TSA?

2 A. We did.

3 Q. Why did you consider doing that?

4 A. Well, Mr. Kirpalani, at that point in time we had lost our
5 eyes and ears to all our assets. Barclays was in control of
6 our computer systems, was -- and this is my understanding of
7 the circumstances, was not cooperating, and probably the single
8 most important activity that Mr. Marsal was telling us he was
9 doing on behalf of the estate, was sitting down with Barclays
10 and explaining that, you know, we were at risk of losing
11 billions of dollars in our derivative book, in our loan book,
12 and our other associated assets. And that if this weren't
13 remedied quickly it would have to take aggressive action to
14 ensure compliance. So there were many, many discussions about
15 whether the estate was proceeding quickly enough with Barclays.
16 Whether Barclays was going to cooperate voluntarily, or would
17 need to be compelled. And, in fact, whether ultimately we
18 could hold Barclays responsible for losses in the book for --
19 losses in the assets that Barclays did not take for the failure
20 to have open eyes and ears to whatever assets were. So the
21 answer is yes, there were many, many conversations about suing
22 Barclays during this time period.

23 Q. But did you -- you didn't run to court to sue them right
24 away?

25 A. No. It was viewed as being counterproductive. The idea

1 was to ensure -- to try to get a working relationship with
2 them, to try to get -- we have to live with Barclays for years.
3 I don't remember how many more years we have left of shared
4 systems and the rest. And the idea was to find a consensual
5 way to make the relationship work, to maximize value of the
6 remaining estates.

7 Q. Okay.

8 MR. KIRPALANI: Nothing further, Your Honor.

9 THE COURT: Is there anything more from anyone else?

10 MR. BOIES: Just two questions, Your Honor to follow-
11 up.

12 RECROSS-EXAMINATION

13 BY MR. BOIES:

14 Q. Mr. Burian, counsel just asked you about Movants' Exhibit
15 394, and he introduced the line of questioning saying that I
16 talked to you about book value. And he asked you to look at
17 the pages. And he said do you see liquidation value mentioned
18 anywhere, do you recall those questions?

19 A. I do.

20 Q. You don't see book value mentioned on those pages, do you,
21 sir?

22 A. No, it was --

23 Q. Okay.

24 A. -- market value.

25 Q. And he said you considered or you told him that you

1 considered suing under the TSA, do you recall that?

2 A. The TSA, sir.

3 Q. TSA. You didn't sue under the TSA, did you?

4 A. Oh, wait. Sue, just 'cause I know you're not a bankruptcy
5 person, when we talk about the time, was coming to court to
6 compel compliance, not, you know, motion practice, not suing
7 someone.

8 Q. Did you do that?

9 A. We -- no, we didn't.

10 Q. Okay. When was the first time you considered Barclays --
11 when you considered suing Barclays in connection with anything
12 to do with the APA, including the clarification letter, that
13 transaction?

14 A. Are you including -- the TSA was part of the APA, sir.

15 Are you including the TSA in that --

16 Q. I'm not talking about going to court because you thought
17 they weren't cooperating, I'm talking about going to Court
18 because you thought that somehow the transaction was not the
19 transaction that you thought had occurred. The thing that
20 brings us here today?

21 A. Right.

22 MR. KIRPALANI: Objection. Objection, Your Honor.

23 THE COURT: What's the objection?

24 MR. KIRPALANI: The objection is this is beyond the
25 scope of my redirect and was extensively covered in his cross-

1 examination.

2 THE COURT: I think that's true. I think we've been
3 down this road a few times.

4 MR. BOIES: The only thing I wanted to be clear, and I
5 think counsel has clarified it. I just want to be clear that
6 the testimony he had given before about when he considered
7 suing Barclays wasn't related to this TSA issue, it was related
8 to the substance of what we're talking about here. That was
9 the only point I wanted to bring -- I wanted to clarify. And I
10 think counsel has agreed to that.

11 THE COURT: So does that end the examination?

12 MR. BOIES: Yes, Your Honor.

13 THE COURT: Mr. Burian, you're excused.

14 THE WITNESS: Thank you very much, Your Honor.

15 THE COURT: I'm sure you're very pleased to hear those
16 words.

17 THE WITNESS: Yes, sir.

18 THE COURT: And we'll call the next witness.

19 MR. GAFFEY: Your Honor, may I approach the witness?

20 THE COURT: Yes.

21 THE WITNESS: Thank you.

22 THE COURT: Mr. Ricci, I'm going to swear you in once
23 people have settled down.

24 THE WITNESS: You want me to stand, Your Honor?

25 THE COURT: You might as well stand, you're going to

1 be sitting for a long time.

2 (Pause)

3 THE COURT: You ready?

4 MR. GAFFEY: Yes, Your Honor.

5 (Witness duly sworn)

6 THE COURT: Be seated, please.

7 MR. GAFFEY: May I proceed, Your Honor?

8 THE COURT: Please do.

9 MR. GAFFEY: Good afternoon, Mr. Ricci.

10 THE WITNESS: Good afternoon.

11 MR. GAFFEY: We've not met. My name is Robert Gaffey,
12 I'm from Jones Day. We're counsel to the debtors.

13 THE WITNESS: How do you do, Mr. Gaffey.

14 DIRECT EXAMINATION

15 BY MR. GAFFEY:

16 Q. Mr. Ricci, by whom are you employed, sir?

17 A. Barclays Bank.

18 Q. How long have you been employed by Barclays Bank?

19 A. Over fifteen years.

20 Q. And as I understand it, sir, you're currently the chief
21 operating officer of the investment banking and management
22 division of Barclays Capital?

23 A. I got a different title now since we last met. I'm the
24 co-chief executive of the corporate investment bank.

25 Q. You were employed by Barclays Capital in September of

1 2008, correct, sir?

2 A. Yes, that's correct.

3 Q. What was your title then?

4 A. I was the COO of the corporate investment bank.

5 Q. And briefly, sir, what were your responsibilities as COO?

6 A. As COO my day-to-day responsibilities involved managing
7 all of the infrastructure functions. So risk, legal
8 compliance, technology, human resources, as well as serving on
9 the executive committee of Barclays Capital.

10 Q. And at that time, sir, you reported to Robert Diamond?

11 A. That's correct.

12 Q. And Robert Diamond was at the time, and is, president of
13 Barclays Capital, is that right?

14 A. That is correct.

15 Q. Thank you. And were you a direct report to Mr. Diamond?

16 A. Yes.

17 Q. And did you work, sir, with a man named Mr. Clackson?

18 A. Yes.

19 Q. What was the reporting relationship vis-a-vis Mr.
20 Clackson, was he next to you, a report to you, where did he fit
21 in the organization chart?

22 A. Mr. Clackson reported to me.

23 Q. Okay. Now, sir, you understand obviously that what's
24 brought us here today is the sale transaction that took place
25 in September of 2008. I want to ask you first about a brief

1 period before the filing of the Lehman bankruptcy, when I
2 understand there were discussions between Barclays on the one
3 hand and Lehman on the other about the purchase of the entire
4 Lehman firm, do you recall those few days?

5 A. Yes.

6 Q. And were you involved in those negotiations?

7 A. Yes.

8 Q. In fact, you were appointed by Mr. Diamond, essentially,
9 as the lead negotiator on those negotiations, is that right?

10 A. I was appointed by Mr. Diamond as the -- the head of the
11 whole transaction. So part of my responsibilities were those
12 negotiations, yes.

13 Q. And you were more or less teed up to be the senior person
14 to lead the discussions on the Barclays side, correct?

15 A. That's correct. I had a large team working with me, but
16 that's correct, I was a senior person.

17 Q. And those negotiations with regard to a potential purchase
18 of the entire Lehman firm took place for several days beginning
19 on or about September 12th, the Thursday, is that correct?

20 A. That's correct, I believe. Yes.

21 Q. And that deal did not come to fruition, as I understand
22 it, is that right?

23 A. That deal did not happen. That is correct.

24 Q. And that deal died on the Saturday?

25 A. On the Sunday.

1 Q. On the Sunday. And in the course of the work from
2 Thursday the 12th through Sunday the 15th, did you have a team
3 of Barclays' people working with you in connection with the
4 negotiations?

5 A. We had a team of Barclays' people as well as lawyers and
6 advisors, as well.

7 Q. And the lawyers and the advisors and the Barclays' people
8 were able to do some degree of due diligence, albeit on a
9 somewhat hurried schedule, is that right?

10 A. It was a very limited amount of due diligence, yes.

11 Q. But included in the due diligence that Barclays was able
12 to do, sir, was some review of values of various classes of
13 securities held by Lehman, is that correct?

14 A. Amongst other assets, yes. Limited, though. I would
15 emphasize on limited.

16 Q. And in the course of that work -- and, again, I'm in the
17 pre-bankruptcy period, Mr. Ricci, in the course of that due
18 diligence, and other work around those negotiations, did you
19 have occasion to work with a man named Martin Kelly?

20 A. I don't believe I directly worked with Martin Kelly during
21 that weekend, no.

22 Q. Who were the main Lehman people you worked with in that
23 pre-bankruptcy period?

24 A. I would have spent most of my time with Mr. McDade. Mr.
25 Kirk, I spent some time with Mr. Fuld. Really at that level of

1 the house, top of the house.

2 Q. And in connection with those pre-bankruptcy discussions
3 between Barclays and Lehman, your team included Jerry
4 Delmessier (ph.), correct?

5 A. That is correct, yes.

6 Q. And Mike Keegan, correct?

7 A. Mike Keegan.

8 Q. And what was Mike Keegan's role?

9 A. Mike Keegan was playing a -- a variety of roles. He did
10 work on the asset valuations of some of the securities and some
11 of the other assets.

12 Q. And did Mr. Keegan report up to you?

13 A. He reports to Mr. Delmessier directly. On the project we
14 had a whole team of people, but reporting to me.

15 Q. And Mr. Stephen King was on the team as well?

16 A. I don't recall if Stephen was on the team that weekend.

17 He --

18 Q. I could jump ahead a bit, because you know we're going to
19 talk about after the bankruptcy too, but he was involved in the
20 post-bankruptcy negotiations, correct?

21 A. That is correct, yes.

22 Q. And what was Mr. Keegan's general area of responsibility?

23 A. Mr. Keegan?

24 Q. Yes.

25 A. Mr. Keegan's general responsibility were valuing assets.

1 Q. And I think I just confused myself. Mr. King, who we were
2 talking about. What was his general area of responsibilities?

3 A. Mr. King works in our -- in securitized structured product
4 area, so he had a very specific role in valuing those types of
5 assets.

6 Q. And one of the people -- and, again, I'm in that period
7 before the bankruptcy, sir. One of the people on the Barclays'
8 team was Michael Evans, is that right?

9 A. That's correct, yes.

10 Q. And Mr. Evans was head of HR, as I understand it?

11 A. That's correct, yes.

12 Q. And also involved were Archie Cox, chairman of the
13 Americas?

14 A. Yes. Mr. Cox was involved.

15 Q. And Michael Klein an outside advisor?

16 A. Michael Klein was also involved, yes.

17 Q. And John Varley had some degree of involvement, is that
18 correct?

19 A. John would have been involved, obviously, as the chief
20 executive of the firm as we were discussing with the board, and
21 with him, whether we could conclude the transaction or not,
22 yes.

23 Q. And had Mr. Varley travelled here to the U.S. or were you
24 reporting back -- to him, back in the U.K.?

25 A. Mr. Varley remained in the U.K.

1 Q. And Patrick Clackson, who we've spoken about, was also
2 involved in the pre-bankruptcy negotiations, correct?

3 A. Yes, that's correct.

4 Q. Now, you said before that that -- we agreed before, I
5 guess, that that transaction came to an end, it died on Sunday
6 the 14th. As I understand it, sir, and briefly, the reason
7 that deal did not go forward had to do with regulatory issues
8 in the United Kingdom, is that right?

9 A. Well, specifically, the reason that the deal ultimately
10 didn't conclude was in order to open on the Monday morning
11 there needed to be a guarantee of the Lehman liabilities to the
12 market. And under U.K. listing rules you need shareholder
13 approval for -- or Barclays needed shareholder approval for a
14 commitment of that size. That would have taken several weeks
15 to put a shareholder meeting together, et cetera. And the
16 United Kingdom regulatory and government agency wouldn't waive
17 that rule. And the United States government would not provide
18 that line either.

19 Q. So for those two -- lacking the necessary commitments from
20 the two respective governments, that deal could not go forward,
21 is that about right?

22 A. That's correct, yes.

23 Q. Okay. Now, shortly after that -- the negotiations of that
24 transaction came to an end discussions arose about a different
25 type of transaction with Lehman, is that right?

1 A. That's correct, yes.

2 Q. And when did those discussions begin?

3 A. Those discussions began in earnest on the Monday.

4 Q. There was, as I understand it, sir, a conversation between
5 Barton McDade and Bob Diamond on Sunday evening, of which you
6 became aware, is that right?

7 A. Yes, that's correct. Late Sunday evening.

8 Q. Who called who?

9 A. I believe Bart called Mr. Diamond. It's what Mr. Diamond
10 told me.

11 Q. Were you party to the conversation or did you have its
12 contents reported to you by Mr. Diamond after it was over?

13 A. Mr. Diamond reported the contents to me.

14 Q. And what, in sum and substance, did Mr. Diamond tell you
15 he had discussed with Mr. McDade?

16 A. Bob said to me that -- I'm sorry, Bob is Mr. Diamond.
17 Said to me that Bart had suggested there may be an opportunity
18 to purchase some Lehman assets or Lehman out of bankruptcy and
19 would be interested.

20 Q. And did Mr. Diamond tell you what his response was to Mr.
21 McDade?

22 A. I believe he said yes, we'd be interested.

23 Q. And were any plan put in place to continue those
24 discussions?

25 A. I believe we agreed to meet again on the Monday morning.

1 Q. Okay. I take it the team that was in the U.S. is still in
2 town, nobody's had time to get back to the U.K. by this point,
3 right?

4 A. I don't recall that everyone was here. But, certainly,
5 there was -- there's still quite a few on the ground, yes.

6 Q. Is Mr. Evans still here?

7 A. I don't recall.

8 Q. What about Mr. King or Mr. Keegan?

9 A. Mr. King and Mr. Keegan are both based in the United
10 States, so I think they were here.

11 Q. And Mr. Clackson?

12 A. Mr. Clackson I believe was still here, yes.

13 Q. Okay. Now, in the due diligence prior to the bankruptcy
14 had any -- had you or any members of your team had any
15 opportunity to look at Lehman's accruals for such things as
16 employee costs?

17 A. I believe we did look at some -- certain type of accruals
18 we would have, yes. We would have looked at the ongoing
19 concern. But, yes.

20 Q. And in that pre-bankruptcy period you'd also had an
21 opportunity to look at, to some degree anyway, vendor contracts
22 and other such business costs, is that right?

23 A. I don't believe we looked at in any details at those type
24 of costs. We were concentrating on buying a whole entity. So
25 the real issue was, you know, on the balance sheet side, which

1 is where most of the attention analysis took place, what were
2 the assets that were of most concern to us that we didn't want
3 to buy. Because, as you may recall in the week prior to that,
4 Lehman had given an investor update and talked about creating
5 something called a spinco, which was going to house some assets
6 that were particularly problematic for Lehman as an ongoing
7 concern. And most of our work that weekend really centered on
8 looking at those assets, because that was a real area of
9 controversy for the institution. And as a matter of fact, in
10 our proposed structure we weren't going to take those assets.

11 Q. When you say in your proposed structure, we're in the
12 second phase?

13 A. No, we're in the first phase.

14 Q. In the first phase.

15 A. As part of buying the entire Lehman entity, we were not
16 going to purchase those assets.

17 Q. Okay. So -- and when the second phase came, when the
18 post-bankruptcy negotiations began the discussions essentially
19 focused on identifying particular assets, or classes of assets
20 that Barclays would purchase from Lehman, is that right?

21 A. Yes. The second transaction is really about buying the
22 people, the buildings, and associated transactions as we chose.
23 Associated assets as we chose, pardon me.

24 Q. There was -- to your mind there was even consideration
25 during this second phase, sir, of just buying the buildings and

1 taking the people and not buying any securities inventory at
2 all, isn't that right?

3 A. There was lots of deliberations around what -- how the
4 structure might look like.

5 Q. You, yourself, gave some thought to buying the buildings,
6 taking the people, and not buying the securities inventory,
7 isn't that right?

8 A. Gave thought to lots of different scenarios, yes.

9 Q. It's a yes?

10 A. I gave thought to lots of different scenarios. And I
11 don't recall particularly whether I thought about not buying
12 any assets.

13 Q. Okay. Now, in the course of these negotiations, beginning
14 the week of --

15 MR. GAFFEY: Steve, can we have the calendar up there.

16 Q. Beginning Monday -- well, Sunday night that first phone
17 call and then they begin in earnest on Monday morning the 15th,
18 is that right?

19 A. That's what I recall, yes.

20 Q. And, again, as he had done with regard to the pre-
21 bankruptcy transaction Mr. Diamond put you in charge of the
22 negotiations, is that right?

23 A. Again, he put me in charge of the entire transaction,
24 which -- part of which was the negotiations, part of which was
25 getting the businesses ready to be run together. And there was

1 a large team of people that supported me, yes.

2 Q. And in between being in charge of the negotiations and
3 having the businesses run together, you also would be
4 responsible for such things as seeing to it that the deal was
5 properly documented, correct?

6 A. There would have been people on the team who were
7 responsible for that?

8 Q. And those people, in turn, were responsible to you as head
9 of the entire effort, correct?

10 A. Yes, as responsible -- ultimately the senior executive in
11 charge, yes.

12 Q. And you understood from the nature of the transaction that
13 was being discussed that one thing that would need to happen in
14 between the conclusion of negotiations and running the
15 businesses together, would be to get this Court's approval of
16 the transaction, correct?

17 A. Yes, we needed the approval of the Court, yes.

18 Q. So within your area of responsibility as the guy in charge
19 of the Barclays' team, was seeing to it that the necessary
20 steps were taken to properly -- to obtain the Court's approval,
21 correct?

22 A. I certainly relied on lawyers and professionals to help me
23 do that. I was ultimately responsible for the whole
24 transaction, yes.

25 Q. I don't mean to suggest, sir, that -- you had to write the

1 brief or come in and argue to the Court. But the point is
2 within the structure, the negotiating structure that you had,
3 the transaction team that you had, there were people who were
4 responsible to see to it that the necessary steps were taken to
5 obtain the Court's approval of the transaction, is that right?

6 A. Yes.

7 Q. Okay. Now, you attended by telephone, I believe, a board
8 meeting of the Barclays board on the 15th of September
9 concerning the transaction, is that right?

10 A. Yes, I did. That's correct.

11 Q. And at that board meeting the board was given a summary of
12 the transaction that was contemplated, that was going to be
13 negotiated with Lehman. Is that correct?

14 A. That is correct. As I've said in my testimony, I fell
15 asleep at that board meeting. I'm embarrassed to say, but I'd
16 been up --

17 Q. We'll seal this part of the transcript, sir.

18 A. -- for several hours, and I'd fallen asleep, but I --
19 that was, the point of the board was, yes.

20 Q. Okay. You were awake enough during the meeting, sir, to
21 understand that the topic was the transaction and that the
22 board approved going ahead with the negotiations, correct?

23 A. That's correct.

24 Q. All right. And you came away from the board meeting with
25 a sense of what the parameters were that the board had

1 established for the transaction. Is that correct?

2 A. That's correct.

3 Q. And you also understood from conversations with Mr.

4 Diamond what the parameters or restrictions were on your
5 authority to negotiate a deal. Is that right?

6 A. Well, the board had approved the transaction and certainly
7 had set some parameters, but I don't recall if I was ever
8 designated authority or to not operate within those parameters
9 or to go back to the board. I was certainly given parameters
10 in which to try to get the deal done, yes.

11 Q. Well, it's a fair statement, sir, that you weren't given
12 authority to make any deal that you thought, in your individual
13 judgment, made sense, correct?

14 A. That's correct. I was working within the parameters of
15 the board. That's right.

16 Q. And you were working within the parameters that the board
17 set and within parameters that Mr. Diamond set when he
18 delegated you to run this, yes?

19 A. Yes. I agree with that.

20 Q. And you also had conversations, did you not, with John
21 Varley about the transaction, the contemplated transaction?

22 A. I had several discussions with Varley throughout the week,
23 yes.

24 Q. And your conversations with Mr. Varley included receiving
25 from him certain instructions or parameters with respect to the

1 nature of the transaction to which you were allowed to agree,
2 yes?

3 A. Can you reword that question --

4 Q. Yes, let me simplify that. Mr. Varley also told you there
5 were certain requirements for any deal, correct?

6 A. Certainly. He set parameters, yes, in line with the
7 board's, yes.

8 Q. And one of the parameters that Mr. Varley set for you was
9 to be sure you protected Barclays' capital in any deal that you
10 made, yes?

11 A. We were to protect -- are you talking about Barclays'
12 capital as in capital not as in Barclays' capital, the entity?

13 Q. I mean the capital of Barclays' capital.

14 A. Okay.

15 Q. Exactly.

16 A. -- price.

17 Q. Yes.

18 A. Certainly. We were to keep Barclays out of harm's way and
19 make sure that Barclays Bank's capital was intact and
20 protected, yes.

21 Q. And your instructions from Mr. Varley included to ensure
22 that any risk you were assuming had enough protection in
23 whatever final deal there was to ensure that Barclays' capital
24 was, at least, no worse off, right?

25 A. To the best we could assess it. That's absolutely

1 correct.

2 Q. And in your conversations with Mr. Diamond you were given
3 to understand, were you not, that it was necessary for the deal
4 to be capital accretive to Barclays or you had no authority to
5 enter into that deal. Is that right?

6 A. No. We -- at the time, again, keeping in mind that week,
7 which I'm sure we're all familiar with, where, you know,
8 markets were in turmoil, values were very depressed and going
9 one way, which was downwards. We had just come out of a
10 transaction that didn't conclude, of which there was lots of
11 speculation around, you know, the adequacy of Barclays' capital
12 position, all that type of rhetoric, concern from regulators,
13 and it was on that, amongst other basis, that the board told us
14 we had to protect the capital. If it was capital accretive,
15 great.

16 Q. Well, sir, was it not your understanding it was actually a
17 condition to the deal from the beginning that it be capital
18 accretive?

19 A. I think when we set the board parameters it was certainly
20 it was going to be capital neutral to positive. Accretive
21 certainly was the intent.

22 Q. I'd like to press a little bit on the difference between
23 intent and condition. Is it your testimony, sir, it was not
24 actually a condition to the deal, that you had authority to
25 make a deal that was not capital accretive?

1 A. I had authority to make a deal that was within the
2 parameters that the board set, and the board had hoped that it
3 would be accretive.

4 Q. Let me show you some testimony that Mr. Diamond gave at
5 his deposition, sir, and I want to ask you if you could comment
6 on that.

7 MR. GAFFEY: Could we put up page 66, lines 13 to 24
8 of Mr. Diamond's deposition?

9 Q. And I asked Mr. Diamond, and I want you to focus on his
10 answer, sir, but starting at line 13 I asked Mr. Diamond
11 "Q. Did you ever learn indirectly whether the Bankruptcy Court
12 was told it was a condition to the deal that it be capital
13 accretive to Barclays?"

14 And this was Mr. Diamond's answer: "The condition to the
15 deal from the beginning was capital accretion. I have
16 explained this many times."

17 Do you see that testimony, sir?

18 A. Yes, I see it.

19 Q. Did Mr. Diamond explain that once or many times to you?

20 A. Can I read the rest of the --

21 Q. Sure.

22 A. -- testimony.

23 Q. The lines you need to read are 13 through 19 down the side
24 of the page.

25 A. Can I see the previous page, please?

1 Q. Sure.

2 (Pause)

3 A. Next page, please.

4 Q. Okay.

5 MR. GAFFEY: Can you turn to page 66?

6 (Pause)

7 A. Can I see the next page, please?

8 (Pause)

9 A. Okay. Thank you.

10 Q. Do you want to just read the last answer on 67 over to 68?

11 A. I think I have been very, very clear.

12 Q. Then turn to 68, please. Okay. That's where Mr. Diamond
13 reminds us that you were the guy in charge. But to go back to
14 page 66, lines 13 to 24, and, in particular, Mr. Diamond's
15 answer to the question at lines 17 to 19. "The condition to
16 the deal from the beginning was capital accretion. I have
17 explained this many times." Did you have that conversation
18 with Mr. Diamond at the time you were negotiating the
19 transaction with Lehman?

20 A. Mr. Diamond certainly wanted the transaction to be capital
21 accretive.

22 Q. Okay. And were you given to understand from Mr. Diamond
23 that it was a board requirement that the deal be capital
24 accretive?

25 A. The board certainly had the intent it would be capital

1 accretive, but if you're asking me if the transaction wasn't
2 capital accretive would the board have gone through with it, I
3 don't know.

4 Q. Were you given to understand by Mr. Diamond that a
5 transaction had to be capital accretive in the sense that there
6 was an asset liability mismatch in Barclays favor? It would
7 take more assets on than liabilities it would assume.

8 A. We never had the specific conversation about how it might
9 become capital accretive, but he certainly wanted it to be
10 capital accretive.

11 Q. Did Mr. Diamond ever tell you, in sum or substance, that
12 if it did not have such an asset liability mismatch you weren't
13 authorized to do the deal?

14 A. I don't recall that.

15 Q. Okay. I'm going to show you another piece of Mr.
16 Diamond's testimony, sir, at page 86, line 25 through 87, line
17 5.

18 MR. GAFFEY: That should start at 86, line 25. I need
19 the question and answer, please. And highlight 25 through 87,
20 line 5.

21 UNIDENTIFIED SPEAKER: If it's possible, Mr. Gaffey,
22 to provide the witness with a copy of the Diamond deposition,
23 it might be helpful.

24 MR. GAFFEY: I don't have one, Your Honor. I afraid
25 I'm restricted to the screen here. I mean, if we have one in

1 the room I'll have it handed up, but I don't have one at the
2 podium.

3 THE COURT: Let's just wait one moment to see if we
4 have a copy.

5 MR. GAFFEY: We're having somebody check the workroom,
6 Your Honor.

7 BY MR. GAFFEY:

8 Q. Without regard to the screen, sir, did Mr. Diamond ever
9 tell you that if the deal was not capital accretive you had no
10 authority to make that deal?

11 A. I don't recall whether Mr. Diamond actually told me that.
12 I can tell you, though, certainly Mr. Diamond wanted the deal
13 to be capital accretive.

14 Q. Okay. He was pretty emphatic about the fact that it had
15 to be capital accretive?

16 A. Given the environment and the parameters the board had
17 set, yes, he wanted it to be capital accretive.

18 Q. And did he say that many times?

19 A. I don't know if he said it many times, but I certainly
20 understood that he wanted it to be capital accretive.

21 Q. And you didn't believe you had authority to make a deal
22 that was not capital accretive to Barclays?

23 A. Again, I don't know. We never got to the point where we
24 were absolutely positive it wouldn't be capital accretive. I
25 mean, there was an awful lot of uncertainty, and we were trying

1 to make sure we had protection in the event that things
2 continued to go wrong, and protection meant, among other
3 things, you know, positive capital accretion.

4 Q. Well, let me ask you this. Before you signed off on a
5 final -- before you agreed on a final transaction with Lehman,
6 with the Lehman representatives, did you check in with Mr.
7 Diamond to give him the structure of the deal before you said
8 yes to the other side?

9 A. I would have been keeping Mr. Diamond posted all day. I'm
10 not sure if I ever had one final check with Mr. Diamond, but
11 certainly he knew the broad parameters of the deal. I recall
12 having conversations with him about this is where we're headed;
13 this is where we're at. Of course the story changed many, many
14 times in terms of the value of the assets, but we had several
15 conversations through the day.

16 Q. I'd like you to focus in terms of conversations with Mr.
17 Diamond on the period Monday the 15th through Tuesday the 16th.
18 It's a fact, sir, is it not, that early in the morning on the
19 16th of September an agreement was reached, an agreement in
20 principle was reached? We'll talk about changes to that deal
21 over the week, but on the Tuesday morning a deal was reached.
22 Is that right?

23 A. We had an agreement in principle on a deal structure, yes.

24 Q. And did you have a conversation with Mr. Diamond before
25 you agreed, in principle, to that deal structure?

1 A. I don't recall. I really don't recall having a
2 conversation with Mr. Diamond. It was, again, lots of moving
3 parts, fast and furious, up all night type of thing.

4 Q. When you described the deal structure to Mr. Diamond did
5 you discuss with him whether or not it was capital accretive?

6 A. Yes, as we were preparing for an investment announcement
7 on the Wednesday to the public, you know, certainly my
8 conversation with Mr. Diamond would have -- would have said
9 look, there's positive accretion here. This is what we need to
10 tell the market, et cetera, et cetera.

11 Q. And did you have discussions with Mr. Diamond or any of
12 the other members of senior management of Barclays as to
13 whether there would be a gain, an economic gain to Barclays on
14 acquisition -- of the deal as contemplated on the 16th?

15 A. Yes. I mean, we announced it publicly on the Wednesday,
16 so, certainly, there was conversations with Mr. Diamond, Mr.
17 Varley, among others.

18 Q. And was it your understanding in the negotiation of that
19 transaction that it was a requirement, a Barclays'
20 precondition, that there be a first day economic gain, a gain
21 on acquisition for Barclays?

22 A. That's what I've said several times. We certainly
23 intended to have one, and we wanted one. As I said to you
24 previously, I don't recall if we didn't have that would we have
25 gone through with the deal or not, I don't know, but,

1 certainly, it was our intent to have one.

2 Q. And was it a fact, in your view, when an agreement in
3 principle was reached on the 16th of September, was there a
4 first day economic gain in the deal?

5 A. As I recall there was a first day economic gain in the
6 deal, yes.

7 Q. And the first day economic gain in the deal was derived
8 from the excess of the assets purchased over the liabilities
9 assumed and the cash paid, correct?

10 A. Yes, I believe that's correct. Yes.

11 Q. And the basic structure of the deal to which Barclays and
12 Lehman agreed on the 16th of September was one in which
13 Barclays would receive, among other things, securities assets
14 of Lehman, correct?

15 A. We purchased some securities, yes, and assumed some
16 liabilities.

17 Q. And that bucket of securities was one of a list of
18 different assets purchased, yes?

19 A. There's a ton of categories, yes.

20 Q. And on the consideration side Barclays paid 250 million,
21 correct?

22 A. 250 million plus the cost of the buildings, yes.

23 Q. Plus the cost of the buildings. And away from the
24 building, well, plus the cost of the buildings, and it assumed
25 certain liabilities, correct?

1 A. That -- yes, we assumed certain liabilities.

2 Q. And those liabilities fell into two broad categories. One
3 was contract cure, correct?

4 A. Contract cure was one.

5 Q. And the other was compensation, correct?

6 A. It was compensation, yes.

7 Q. And the liability that Barclays agreed to assume -- do you
8 need a moment there, sir?

9 A. No. It's just a fly.

10 Q. Okay.

11 A. Sorry. I hope it's not me.

12 Q. The compensation liability --

13 THE COURT: He does seem quite attracted to you.

14 Q. I've never seen anybody say that literally, sir. The
15 compensation liability that Barclays agreed to assume, sir, was
16 agreed between you and Mr. McDade, the amount. Is that right?

17 A. That's correct.

18 Q. You agreed with Mr. McDade that the amount that Barclays
19 would assume would be two billion dollars. Is that right?

20 A. Two billion dollars.

21 Q. And when the deal came to be documented you understood
22 that that assumption of liability for comp at a two billion
23 dollar level was properly documented in the deal, correct?

24 A. My understanding was that it was and that the two billion
25 dollar assumption was to cover all comp and -- compensation,

1 which included bonuses as well as severance.

2 Q. Well, I wouldn't actually --

3 A. There were some concerns around the documentation of a
4 certain clause, if I recall, that I wasn't happy with.

5 Q. I hadn't, actually, asked you that, sir, although we'll --

6 A. All right.

7 Q. -- to it in a while, so, for the moment, let's agree to
8 disagree about what the two billion covered and just talk about
9 the number.

10 A. Okay.

11 Q. The number was two billion for the comp related assumption
12 of liability, correct?

13 A. Yes. Two billion dollars.

14 Q. And with regard to the assumption of liability for
15 contract cure there had been some work done to create a good
16 estimate of what that contract cure would be. Is that right?

17 A. There was an estimate. It was, certainly, a, sort of, a
18 maximum exposure number that we could have had under the
19 contract, yes.

20 Q. And did you, in the course of your work as the man in
21 charge of the deal, did you come over the course of the week to
22 understand what numbers the Court was given with regard to
23 contract cure?

24 A. The number I have in mind was two and a quarter billion.
25 I'm assuming that's what the Court was told. I can't recall.

1 Q. I will represent to you, sir, so that we're not confused
2 over the next couple of questions, that there was a two and a
3 quarter billion dollar number, but on the 17th of September the
4 Court was told the exposure would be 1.5 billion. Does that
5 refresh your recollection about that original number dropping?

6 A. The 1.5 billion, there was estimates for numbers across
7 Lehman all over the place. The 1.5 billion isn't a number that
8 I recall, but there were certainly wide estimates across an
9 awful lot of things that Lehman was representing to you, which
10 were different for the week. So if you're telling me there
11 were different numbers around cure, there was different numbers
12 around lots of things we were talking about, so it wouldn't
13 come as a surprise to me.

14 Q. And at the same time that these numbers were flying around
15 Barclays was internally calculating what it thought it might
16 wind up paying in contract cure and compensation. Is that
17 right?

18 A. No, the cure number came from Lehman.

19 Q. I'm not suggesting the number was calculated.

20 A. We didn't have time to do a proper analysis of what we
21 might spend, what it might cost us. What we wanted was what
22 was the maximum exposure, again, trying to protect Barclays'
23 interest, not put Barclays in harm's way. Didn't want to get
24 stuck with something that, you know, we hadn't planned on. So
25 we were looking for the maximum exposure, and then we would,

1 you know, obviously start our due diligence around what we
2 needed to pay as practically as possible. But Lehman had all
3 that information.

4 Q. My question, sir, went to Barclays internal valuations. I
5 take it with regard to those internal valuations you're also
6 looking for the maximum exposure, because you didn't want to
7 underestimate that amount, right?

8 A. That's correct.

9 Q. Okay. So the amount of work that was done inside Barclays
10 with regard to calculating an estimate of contract cure would
11 have been on the conservative side. Make the number bigger,
12 not smaller, so you know what you're looking at.

13 A. Again --

14 Q. Yes?

15 A. Very limited. The number came from Lehman. They were --
16 we did the limited work we could to get ourselves comfortable
17 to that extent we could, that that was the maximum exposure.
18 There wasn't a lot of work done on what cure might actually be.
19 We didn't have the information, and, again, there was lots of
20 other things going on.

21 Q. Again, sir, I'm not talking about the numbers that came
22 from Lehman. We seem to be missing each other here. I'm
23 talking about the internal valuations that Barclays was doing.
24 There were calculations done inside Barclays that were not
25 shared with Lehman where Barclays made an effort to estimate

1 what the contract cure number would be. Isn't that correct?

2 A. I don't recall, but it's certainly possible.

3 Q. Would it have surprised you if it wasn't happening, sir,
4 that Barclays just accepted whatever estimate Lehman gave them
5 and figured it all out after the contract was signed?

6 A. What we would have been focusing on was maximum
7 protection.

8 Q. So in maximum protection, sir, were there internal
9 valuations? Barclays would have wanted the most conservative
10 approach to that, maximize the possible number.

11 A. I don't know if it would have wanted -- we wanted maximum
12 protection. I don't think we would have tried to maximize a
13 number. I think there's a difference.

14 Q. I guess my --

15 A. One implies, sort of, ill will. I think the other is
16 looking at, you know, the -- maximize the number versus
17 maximizing protection. I think there's an important difference
18 there.

19 Q. At least, let's, I'll use your phrase. Maximize the
20 protection. The point about maximizing the protection, sir, is
21 when you're estimating what you're likely to pay in contract
22 cures you're going to take extra steps not to come in with too
23 low a number. You don't want any surprises, right?

24 A. You don't want surprises, correct.

25 Q. Now, you did expect that on a combination -- well, once

1 the North American broker-dealer was purchased by Barclays
2 there would be certain synergies that would lead to savings on
3 the vendor side, yes?

4 A. Potentially.

5 Q. Well, you wouldn't need, for example, two Bloomberg
6 contracts or two telephone contracts or you could -- these are
7 contracts that Barclays already had in place, yes?

8 A. You wouldn't need two Bloomberg contracts, but, you know,
9 you would need Bloomberg terminals, and having not a great idea
10 what their contract was versus what our contract was, you would
11 hope there'd be synergy, sure.

12 Q. So is it your testimony, sir -- well, let me just ask you
13 it. It was not the working assumption inside Barclays that the
14 maximum number, the total number of Lehman contracts, would all
15 be assumed by Barclays, yes? Is that correct?

16 A. Sir, can you repeat the question?

17 Q. Barclays did not assume it was going to -- it did not work
18 on the assumption it was going to take over all of the Lehman
19 contracts, correct?

20 A. We had a maximum exposure that we knew we had. Of course
21 we were going to try and work to try to minimize our exposure.
22 Anybody would.

23 Q. And one of the reasons you wanted to minimize that
24 exposure is you wanted to create for Barclays a cushion to
25 protect it and to protect its capital after the transaction was

1 closed, correct?

2 A. We assumed the number assuming that could be our exposure.

3 If we could underspend it and create a cushion, yes.

4 Q. And it was your hope to underspend the amounts that were
5 estimated for comp and cure.

6 A. It was our hope.

7 Q. And calculations were done inside Barclays to determine
8 the degree to which those amounts could be underspent. Isn't
9 that correct?

10 A. I don't recall that those were done, if anything was done
11 prior to the close. We certainly were making estimates all the
12 time, and, as you're aware, on the compensation side we spent
13 the full amount.

14 Q. On the -- well, again, sir, we're going to have to
15 disagree, agree to disagree about that one, too, but with
16 regard to all the work that was being done, were any of
17 Barclays internal valuations shared with the Lehman
18 negotiators?

19 A. I don't recall.

20 Q. Do you recall any point where anyone on the Barclays side
21 of the table said to anybody on the Lehman side of the table,
22 in sum or substance, no, the contract cure number is not going
23 to be nearly that high?

24 A. I don't recall that happened.

25 Q. Do you recall any conversation between anyone on the

1 Barclays side of the table and the Lehman side of the table
2 where Barclays allowed as how the comp number might not
3 actually be the agreed two billion dollars?

4 A. Well, the comp number was constantly being talked about,
5 and we were obviously working with Lehman as to, you know, what
6 the number was going to be, so I don't know if there were
7 conversations about the comp number might be this, the comp
8 number might be that. That's possible.

9 Q. The comp number was agreed initially at two billion, yes?

10 A. Two billion dollars, yes.

11 Q. That's the agreement you made with Mr. McDade, correct?

12 A. Yes.

13 Q. And there was no point between the time you made that
14 agreement with Mr. McDade that the comp number would be two
15 billion and the conclusion of the sale hearing on the 19th of
16 September, that that number was ever reduced. Isn't that
17 right? It stayed at two billion all week.

18 A. It stayed at two billion.

19 Q. Okay. It stayed at two billion through all the
20 applications to the Court, yes?

21 A. I think that's correct.

22 Q. It stayed at two billion all the way through the sale
23 hearing, correct?

24 A. I believe that's correct.

25 Q. Did you attend the sale hearing?

1 A. No. I was not at the sale hearing.

2 Q. Okay. Did you get reports from people who did?

3 A. Yes.

4 Q. And you understood from those reports that the two billion
5 dollar number was given to this Court with regard to the
6 assumption of liability for compensation. Is that right?

7 A. I don't know if I was specifically briefed on that number,
8 but I'm aware that was the Court -- the number that was
9 presented, yes.

10 Q. Now, sir, did you -- there came a time when the agreement
11 in principle that was reached on the morning of the 16th was
12 documented in an asset purchase agreement. Is that right?

13 A. Yes.

14 Q. Did you ever read the whole thing?

15 A. I would have read various components of the draft, yes.

16 Q. I take it that's a no. You never read the whole thing?

17 A. I would have -- I would have read the -- yes, I would have
18 read it.

19 Q. Okay. Did you read the whole thing, sir?

20 A. Yes, I would have read the whole thing.

21 Q. Did you read the whole thing when it wasn't final? You
22 mentioned a moment ago you looked at it --

23 A. It don't know if I read it if it wasn't final.

24 Q. Did you read the copy of it that was submitted to the
25 Court?

1 A. I don't recall specifically reading it, but I'm sure I
2 did, to be honest. Yes.

3 Q. And one of the sections you did read was the definition of
4 purchased assets, correct?

5 A. Yes.

6 Q. If you would turn in your book, sir, to Exhibit M-1? It
7 should be the first tab in that book in front of you. Do you
8 recognize that to be the asset purchase agreement?

9 A. Yes.

10 Q. And would you turn, please, to page 6? And you'll see
11 that on page 6, sir, begins the definition of purchased assets.
12 It's about midway down the page. Do you see that?

13 A. Yes.

14 Q. And directing your attention in particular to Subsection D
15 concerning government securities, commercial paper, et cetera.
16 Would you read through that section to yourself? Tell me when
17 you've had a chance to do that.

18 (Pause)

19 A. Yes.

20 Q. Have you read that through? Did Barclays agree to
21 purchase a so-called long position that had a book value as of
22 September 16th of approximately seventy billion dollar?

23 A. I believe that's correct, yes.

24 Q. Do you know how the book value was determined?

25 A. I don't. I don't know if it was Lehman's number or fair

1 market value. I don't recall how that was determined.

2 Q. But your understanding is they were Lehman's numbers?

3 A. As I said, I don't recall whether they were Lehman's
4 number or Barclays' numbers.

5 Q. Do you think Barclays might have determined what Lehman's
6 book value was, sir?

7 A. No. Barclays wouldn't have determined anything to do with
8 Lehman's books, but we -- maybe we were looking at a fair value
9 price of the book value as it pertained to Barclays. But it
10 was book value in this context that came from Lehman. I accept
11 that.

12 Q. Now, I mentioned before, sir, that you had given some
13 consideration -- you and, I guess, members of Barclays' team
14 had given some consideration to just taking the people in the
15 buildings and not taking any securities positions. Is that
16 right?

17 A. Among other scenarios, yes.

18 Q. And one of the reasons that scenario was considered is
19 Barclays was in a position to run the broker-dealer without
20 that particular long position. It could buy that type of
21 security on the open market, yes?

22 A. Theoretically it could have. That wasn't -- I don't
23 remember exactly why we or the scenarios in which we considered
24 these options.

25 Q. And if it needed securities of that type and that amount

1 in order to run the business it could buy them at market
2 values, correct?

3 A. Correct. We were very worried about clients, about
4 reputation, about, you know, making sure we had an ongoing
5 business, and all that factored into what we bought and what we
6 didn't buy.

7 Q. And the fact is, sir, that you only decided to include the
8 securities assets and not just take the people in the buildings
9 because to do otherwise, in Barclays' view, might be looked
10 upon unfavorably by the Bankruptcy Court. Is that correct?

11 A. I don't recall that.

12 Q. You have in that book, sir, your deposition transcript.
13 I'd ask you to turn to that tab and go to page 280.

14 A. What tab is that?

15 Q. I think the tab should just be labeled "Transcript", sir.

16 A. Okay.

17 Q. And when you get to page 280, sir, I would direct your
18 attention to the question that begins at line 16 and the answer
19 that concludes it, line 24. Do you see that question and
20 answer?

21 "Q. Why did Barclays want to buy Lehman assets?"

22 MR. GAFFEY: Strike that.

23 "Q. Why did Barclays want to buy securities positions from
24 Lehman on Monday, September 15th?

25 "A. My understanding was that there was a view expressed that

1 just taking the people and the buildings wouldn't be a
2 situation that would be looked upon favorably by the Bankruptcy
3 Court."

4 Do you recall that question and answer at your deposition,
5 sir?

6 A. I do.

7 Q. Okay. So when you say that that wasn't you, does that
8 refresh your recollection that that was --

9 A. Yes. I said I didn't recall. That reflects my
10 recollection, yes.

11 Q. And, so, it refreshes your recollection that as the guy in
12 charge of the negotiations the reason that Barclays purchased
13 the securities position was because it thought it would be
14 looked on unfavorably by the Bankruptcy Court if it did not.

15 A. Among other things, yes.

16 Q. Okay. And you agree with me, sir, that to run -- had it
17 purchased the Lehman North American broker-dealer it didn't
18 need that particular long position that we talked about before.
19 It could have bought a long position out in the open market.

20 A. Theoretically it could have. But in that
21 environment --

22 Q. Well, it's more than theoretical, sir.

23 A. In that environment it was very difficult to replicate
24 those assets.

25 Q. Well, one of the reasons it bought this particular long

1 position, sir, was because it got a very good price on them.

2 Isn't that right?

3 A. These particular assets, the valuations of these assets,
4 was all over the place. At the end of the day these aren't the
5 assets we bought.

6 Q. Well, you bought the assets you bought after the result of
7 intensive negotiations between traders for Barclays and traders
8 for Lehman about the value of that long position. Isn't that
9 correct, sir?

10 A. Yes.

11 Q. And Barclays, obviously, as it would in any negotiation,
12 wanted to pay the lowest possible price. Is that right?

13 A. We needed to record the prices on our books at fair market
14 value.

15 Q. And to the extent that you could determine such a value
16 with a buffer in it that would help to cover costs in the
17 transaction, wouldn't it? It would create that cushion we
18 talked about, wouldn't it?

19 A. We were looking for buffers across the whole transaction
20 phase.

21 Q. So you were looking for buffers in costs in the price that
22 Barclays paid for the long position and in any savings on the
23 assumed liabilities. Those are the two basic categories to
24 find a buffer. Isn't that right?

25 A. Well, there was other ones as well. There was the

1 recording of intangible assets and the value of those and --
2 among others.

3 Q. Okay. Can you think of any other than those three, fine
4 cost savings and the assumed liabilities, pay less for
5 securities assets and intangibles?

6 A. It's confusing on the security assets because on the asset
7 side we were looking to pay the fair value for the asset and we
8 assumed certain liabilities. So theoretically if you -- well,
9 if you assumed assets and you assumed -- if you bought some
10 assets and assumed a few liabilities it could also create a
11 gain.

12 Q. You would agree with me, sir, if you got -- the more
13 favorable the price you get for the securities assets the
14 bigger the buffer you have, yes?

15 A. It depends. Potentially yes, but we were looking for the
16 fair value price. As you'll recall, at the end of the day, we
17 were looking at a transaction, you're aware, with the Fed
18 stepped in where we put up forty-five billion dollars of
19 cash --

20 Q. We're going to come to that, sir.

21 A. -- and we're looking for value of securities in excess of
22 that with the buffer.

23 Q. We will come to that, I promise you, sir.

24 A. Okay.

25 Q. We're still back in the period, the 15th and the 16th.

1 A. Sorry. I'm going to trying to give you other scenarios.

2 Q. I appreciate that but let's talk about the scenario of the
3 asset purchase agreement that was actually filed in the court.
4 Okay. The asset purchase agreement that was filed in the court
5 referred to a seventy billion dollar long position, yes?

6 A. Yes.

7 Q. Okay. And that long position, the price that Barclays
8 paid for that was negotiated, yes?

9 A. Yes.

10 Q. Now these -- this cushion, this buffer that we've talked
11 about, in the course of the whole week, sir, even as the deal
12 changed, to your knowledge was any notion of a cushion or a
13 buffer for Barclays disclosed to the Court at any point prior
14 to the issuance of the sale order approving the transaction?

15 A. It was disclosed publicly on Wednesday, I think,
16 September -- whatever that date was in September, publicly by
17 Barclays.

18 Q. And you're referring to a certain press release, are you
19 sir?

20 A. To an investor call and press release.

21 Q. As the man in charge of the transaction to whom the whole
22 team reports, please describe to this Court what steps you took
23 to make sure that whatever was in that press release, or any
24 other announcement, was actually reported from the floor of
25 this court, to this Court, while approval was sought of this

1 transaction.

2 A. It wasn't in the courtroom. And again, I was worried
3 about complying with the law and in the U.K. our law was to
4 make public the terms of the transaction at that time, to the
5 best of our knowledge. Relied on lawyers and others to make
6 sure the Court knew what the appropriate representations were,
7 it was a public forum. Lots of people were on the call
8 including, I think, members of this creditors' committee
9 related to this sale and it was a public document in the public
10 domain. I can't speak to --

11 Q. Do you remember the question I asked you, sir?

12 A. I can't speak to the lawyers or whatever insuring -- I'm
13 assuming that the lawyers and others representing me made the
14 appropriate representations to the Court. I'm not a lawyer,
15 sir.

16 Q. I understand that, sir, but you had lawyers, didn't you?

17 A. I did indeed.

18 Q. All right. What steps did you take, sir -- as the man in
19 charge of the transaction, what steps did you take to make sure
20 those lawyers made sure that this Court knew about buffers or
21 cushions in the deal for Barclays?

22 A. I would have asked counsel to ensure that the Court needed
23 to know everything they know. I was assured by counsel that
24 was the case.

25 Q. All right. And you've told us that you were sure to

1 comply with U.K. law with the press release and public
2 announcements, yes?

3 A. Uh-huh.

4 Q. And I believe you referred to a transcript or to a call.
5 You're talking about an analyst call, is that right?

6 A. An analyst call, yes.

7 Q. And the transcript of that analyst call was submitted to
8 the FSA or U.K. regulator, correct?

9 A. Yes.

10 Q. What steps, if any, sir, did you take to make sure that
11 the transcript of that analyst call was filed in this court?

12 A. Again, I relied on my attorneys and asked my attorneys to
13 make sure and assure me that, you know, everything appropriate
14 that needed to be filed with the court was filed with the court
15 and I was given their assurances.

16 Q. Okay. Did you ever get from anyone, sir, the
17 understanding that the asset purchase agreement prohibited
18 Barclays' representatives from describing the transaction to
19 the Court?

20 A. No, sir.

21 Q. Nobody ever told you anything like that, did they?

22 A. Not that I recall.

23 Q. And you understood that your lawyers present in this court
24 were responsible to make disclosures as necessary so that full
25 and fair disclosure of the transaction was made to the Court,

1 is that right?

2 A. As I said, I was assured by my attorneys that everything
3 that was needed to be disclosed to the Court was disclosed to
4 the Court.

5 Q. Okay. And with regard to the press release you described
6 to me before, you knew sir, that it had been published as
7 necessary to comply with U.K. regulations, yes?

8 A. Yes.

9 Q. Okay. Did you know, sir, one way or the other, during the
10 week of the 15th of September, whether that press release was
11 brought to the attention of this Court or the creditors in this
12 bankruptcy in connection with this sale transaction and the
13 motion to approve it?

14 A. Sorry. I'll say it again, I asked my lawyers to make sure
15 and assure me that everything appropriate had been represented
16 to the Court and I was assured thereof.

17 Q. Now to achieve this cushion, sir, it was important to
18 Barclays to take from the deal assets -- more assets than
19 trading liabilities, yes?

20 A. More assets than liabilities.

21 Q. Okay. And one way to do that would be to insure that
22 there was a liquidity premium in the value of the assets, yes?

23 A. It depends how we have -- how we're using that term. When
24 I think of liquidity premium it's in relation to marketing an
25 asset to a market value in an instance where there might not

1 be, A, you know a really clear view of what market value is but
2 the asset's illiquid. So you're using a liquidity premium as,
3 sort of, a counterintuitive term to, you know, factor that in
4 to determining what a fair value or market price might be.

5 Q. It's a counterintuitive term because it means lower the
6 price, not raise it. Is that what you mean?

7 A. Yeah. No. In the sense of -- you might want to say it's
8 an illiquidity premium rather than a liquidity premium. That's
9 what I was referring to.

10 Q. What it means is you pay less than you otherwise would?

11 A. You're fair valuing an asset then, you know, because I'm
12 not sure if you're selling it or not but if you're valuing an
13 asset and there's no market for it, there needs to be-- there's
14 no market price for it and it's illiquid and hard to sell, it
15 needs to be a discount from that value to something that
16 reflects its illiquidity.

17 Q. Would it be fair to say, sir, that as of the time the
18 asset purchase agreement was executed that in your view you
19 would think there would be a discount off the Lehman assets,
20 off Lehman's marks on its assets?

21 A. I can't speak to Lehman's books but, you know, that whole
22 week we were seeing volatile prices, illiquid markets as we
23 were assessing assets, our assets, assets for looking the
24 market. There was all sorts of issues around illiquidity and
25 liquidity premiums were factored into fair values.

1 Q. The question I asked you was discount, sir.

2 A. You can use the word discount but when we're talking about
3 discount it's discount of an asset to market value.

4 Q. Which, in your view, could constitute a discount off of
5 Lehman's books to whatever your view of market value is, yes?

6 A. This was the process we were in together with Lehman to
7 determine what the fair value of those assets would be.

8 Q. And to your knowledge, sir, was there a discount off of
9 Lehman's book value in the price paid for the securities assets
10 in this transaction?

11 A. I can't speak to their book values but certainly their
12 marks that we started using were very stale and needed to be
13 revised to reflect the market conditions.

14 Q. I know you want to tell me that, sir, but I'd rather you
15 answer my question. Was there a discount off of Lehman's
16 marks?

17 A. I can't speak to Lehman's books.

18 Q. Would you think there would have been a discount off of
19 Lehman's marks?

20 A. Their marks were very stale. It was a very illiquid
21 environment, sure.

22 Q. Is that a yes when you say sure?

23 A. Yes, I would have assumed they would have been.

24 Q. Okay.

25 A. Remember, we were using asset values from --

1 Q. Sir there's no question for you.

2 A. -- Friday, trying to price assets on Wednesday in the
3 worst market conditions in thirty-five, sixty years.

4 Q. Is there anything else you'd like to say, sir, before I
5 put a question to you?

6 A. I'm sorry.

7 Q. Thank you.

8 THE COURT: He's showing off his preparation.

9 MR. GAFFEY: Pardon me?

10 THE COURT: I said he's showing off his preparation.
11 I can see what's going on here.

12 Q. Now you mentioned before, sir, there was a time -- well
13 actually, we talked a bit before about internal valuations at
14 Barclays concerning the comp and cure liabilities. Do you
15 recall having discussions with Skip -- well first of all, do
16 you know who Skip McGee is?

17 A. Yes.

18 Q. Okay. He works for Barclays now?

19 A. Yes, that's correct.

20 Q. And at the time he was on the other side of the table for
21 Lehman?

22 A. That's correct, yes.

23 Q. And in the negotiations with Lehman you talked to Mr.
24 McGee about establishing that -- a bonus pool, yes?

25 A. A compensation accrual, yes.

1 Q. Okay. And the compensation -- this is the compensation
2 accrual we talked about that was agreed with Mr. McDade at two
3 billion dollars?

4 A. Yes.

5 Q. All right. And you mentioned before that the deal changed
6 during the week, you told me about the repo and how things
7 looked but that never changed, did it? That two billion stayed
8 there?

9 A. That two billion -- that number was pretty stable, yes.

10 Q. Right through the closing, yes?

11 A. Yes.

12 Q. Now, did there come a time, sir, where you had
13 communications with another member of the team concerning what
14 he called a 650 million dollar problem with that two billion
15 dollar item?

16 A. Yes.

17 Q. Why don't you turn to tab 24 in your book, it's Movants'
18 Trial Exhibit 24. Can you tell me when you've found that
19 document, sir, or it's on the screen, if that's easier.

20 A. I'm there.

21 Q. Now this, Movants' Exhibit 24 in evidence, sir, is, at the
22 top, an e-mail from you to Patrick Clackson with a copy to
23 Archie Cox (ph.); do you see that?

24 A. Yes.

25 Q. And the title is 650 million dollar problem?

1 A. Yes.

2 Q. And in your e-mail to Mr. Clackson, with a copy to Mr. Cox
3 and Michael Evans, the head of HR, you say "Never agreed to it.
4 Archie, this is the problem. We can't have this clause, I
5 don't think." Do you see that?

6 A. Yes.

7 Q. And you'd agree with me, sir, that the clause you're
8 referring to is language taken from the final asset purchase
9 agreement regarding annual bonuses?

10 A. It's a subset of that clause, yes.

11 Q. Okay. I can take the time -- I can take out the asset
12 purchase agreement, sir, but my guess is you've been through
13 this. Do you understand that that is language from the final?

14 A. Yes.

15 Q. No reason to think it's not the actual language from the
16 contract?

17 A. Yes.

18 Q. Okay. Now, in the underlying e-mail, Mr. Clackson writes
19 to Mr. Evans and to you and says, "This is a problem. They
20 have two billion in the agreement. I was relying on you guys
21 telling me I needed 1.35 billion, which gave me 650 million of
22 the goodwill. But the para below says we have to pay it to
23 them, can't use. Archie says you have agreed to this. Help."
24 That's the e-mail that Mr. Clackson writes, yes?

25 A. Yes.

1 Q. And you understood Mr. Clackson to be telling you that the
2 contract required the expenditure of the whole two billion on
3 bonuses but that he'd only budgeted 1.35 billion, is that
4 right? Hence the title 650 million dollar problem.

5 A. Yes. I think Mr. Clackson's flagging that issue.

6 Q. Okay. Mr. Clackson's flagging the fact that in order to
7 calculate goodwill, you understand that to be a reference to
8 negative goodwill?

9 A. That's right.

10 Q. To gain, yes?

11 A. Yes.

12 Q. Okay. So in order to generate the gain that Barclay is
13 planning, the 650 million dollar problem that Mr. Clackson
14 identifies is the contract says we have to pay two billion but
15 we're only planning on spending 1.35, is that how you
16 understood his e-mail?

17 A. I think there's a couple of things going on here, if I
18 may?

19 Q. If I can have a yes or no.

20 A. Okay.

21 Q. If I could have a yes or not first, sir, and then I'll let
22 you explain.

23 A. Okay. Could you repeat the question, please?

24 Q. I think I've forgotten the question. Isn't it a fact,
25 sir, that the 650 million dollar problem that Mr. Clackson is

1 identifying here is that he's figured out the contract requires
2 Barclays to pay two billion but Barclays is only planning on
3 spending 1.35 billion, yes or no?

4 A. Yes.

5 Q. And did you understand that to be the issue as well?

6 A. There was a couple of issues going on here. One was that
7 Mr. Clackson had some particular accounting concerns around
8 open accounting books and negative goodwill. And number two, I
9 was very concerned, I think as I testified earlier, about the,
10 sort of, bonus payment that would be going back to employees if
11 a certain number of employees left Lehman, as I didn't think
12 that was fair and that was the -- my reference to the problem
13 to Archie Cox.

14 Q. Well, as the contract actually reads sir, the bonuses are
15 paid to employees not severed employees, yes?

16 A. No. Sorry; that was a yes but there's a clause that says
17 if certain employees leave some money reverted to people who
18 were there.

19 Q. Okay. Regardless of what's best or desirable or fair, the
20 problem that Mr. Clackson is surfacing to you here is the
21 contract actually says Barclays was supposed to pay two billion
22 dollars for bonuses, yes?

23 A. We have an obligation to pay two billion, yes.

24 Q. And so that, in turn, leads me to my next question which
25 is this was a problem because Barclays was planning on spending

1 only 1.35 billion for bonuses, isn't that right?

2 A. There was numbers throughout the week as to what we were
3 going to spend. At this point in the process Patrick's saying
4 look with only assuming 1.35 billion in my calculations, hoping
5 to save on the two, yes.

6 Q. Okay. And hoping to save on the two means hoping to draw
7 650 million dollars gain out of the difference between the two
8 billion in the contract and the 1.35 billion that is that
9 scenario for bonus expenditures, yes?

10 A. Yes. Whether that was for open accounting periods or
11 whatever was in his mind, but that is correct. Yes.

12 Q. Okay. And in these various scenarios that were going on
13 during the week, to calculate what bonus would actually be --
14 what money would actually be spent on bonus, you never saw one
15 above two billion, did you?

16 A. I can't recall. There was a lot of numbers going on.

17 Q. Did you ever see one above two billion dollars?

18 A. Not that I recall.

19 Q. Okay. And all the calculations you saw were below two
20 billion dollars; isn't that right?

21 A. Any ones I saw I don't recall if they were above two
22 billion.

23 Q. And as the man in charge of the transaction, sir, would
24 you tell the Court what steps, if any, you took to ensure that
25 when the Court was told there would be two billion spent on

1 compensation, Barclays was actually calculating how it could
2 spend less? Were any steps taken along those lines?

3 A. Again --

4 Q. It's a yes or no question, sir.

5 A. Sorry. Again, I would have relied on --

6 Q. Again, sir, it's a yes or no question. I'll let you
7 explain but you have to answer the question yes or no first.

8 A. Sorry. You asked me what steps I took. Sorry.

9 Q. That's a good point. You win that one.

10 A. Sorry. Sorry. With all due respect. Sorry.

11 Q. I'm trying.

12 THE COURT: We're all following the David Boies
13 example of disciplining witnesses.

14 MR. GAFFEY: Only when the pen is pointing at the
15 screen, Your Honor.

16 THE WITNESS: So sorry. Again, I would have relied on
17 counsel to represent what was told to the Court. I wasn't
18 here.

19 Q. Did you take any steps?

20 A. What about?

21 Q. On that issue, on the difference between what Barclays was
22 internally planning to pay and what the Court told them to pay?

23 A. Again, I would have asked specifically -- not on this
24 specific issue, I would have asked broadly did we tell the
25 Court everything we needed to tell the Court.

1 Q. Now you said, sir, that the number moved around during the
2 week?

3 A. Yes.

4 Q. That calculation of -- you see that Mr. Clackson's number
5 for -- on the 17th of September is 1.35 billion, yes?

6 A. Yes.

7 Q. Okay. Let me ask you to take a look at Exhibit 91 in your
8 book, do you have M-91?

9 A. Yes.

10 Q. And you'll see, sir, that Exhibit M-91, in evidence, is
11 from Michael Evans to Mr. Diamond, to Mr. Delmissie (ph.) to
12 Roger Jenkins and to you entitled "Summary of Current
13 Spending". Do you see that?

14 A. Yes.

15 Q. Who is Mr. Jenkins? We haven't talked about him?

16 A. Mr. Jenkins was the head of our structured capital markets
17 biz at this time.

18 Q. And --

19 A. Sorry. And a member of the Barclays capital executive
20 committee.

21 Q. And you see, sir, that Mr. Evans is describing to you on
22 the 23rd of September -- well, do you remember when the deal
23 closed, sir?

24 A. The deal closed on Monday morning.

25 Q. That would be the 22nd of September?

1 A. The 22nd of September.

2 Q. Okay. So the day after the closing Mr. Evans sends this
3 memo to, among others, you entitled summary of current spend,
4 do you see that?

5 A. Yes.

6 Q. I'd ask you to turn to the second page of the document,
7 sir, it's Bates number -- that's the number in the lower right-
8 hand corner, 27191.

9 A. Yes.

10 Q. Okay. Are you with me?

11 A. Yes.

12 Q. And there's a "Table Summary of Current Spend". Do you
13 see that?

14 A. Yes.

15 Q. And you understand that that table outlines planned bonus
16 expenditures?

17 (Pause)

18 A. Yes.

19 Q. And you see that the "Total Pool Funding Available", the
20 last line on that table, puts the pool at 1.4 billion dollars.
21 Do you see that?

22 A. Yes.

23 Q. So, in between Mr. Clackson's memo of the 17th, which had
24 the 650 million dollar problem created by 1.35 billion and the
25 day after the closing, that number's only moved by a relatively

1 small amount. You're still only at 1.4, is that right sir?

2 A. On this date, yes.

3 Q. So from the beginning of the week you're at 1.35, at the
4 end of the week you're at 1.4. Did the number really move
5 around that much during the week, sir, or was it always the
6 plan? Was that the original bonus pool, 1.4 billion dollars?

7 A. It did move around quite a bit during the week because --
8 may I explain? Because what was happening was, we had 10,000
9 people that we were trying to hire, some with guarantees, some
10 without. And this was a series, there's a series of these
11 e-mails to Mr. Evans that went on for a while after this, I
12 recall, that would give various updates as to how -- you know,
13 what was going on, what was happening. Everybody that we
14 wanted to stay longer we didn't have in that pool day one and
15 we negotiated, you know, with those 10,000 people long after
16 the close. So there was various approximations of what the
17 number might be. I would call this a snapshot.

18 Q. And this snapshot is 600 million dollars below the number
19 you agreed with Mr. McDade, correct?

20 A. Yes. We have a -- I think it's the residual pool
21 available for non-GB purpose. Oh, sorry. Yes, 600 million.
22 Sorry. You're correct. Yes.

23 Q. So it's also 600 million dollars below the number that was
24 given to this Court, correct?

25 A. At the snapshot stage, yes.

1 Q. And that snapshot, as you put it, on the 23rd is actually
2 the amount of the original bonus pool that Barclays planned,
3 isn't that right?

4 A. Again, the number was moving all over -- a lot during the
5 week and we needed to make sure that we kept people and, you
6 know, we had 10,000 people to try to address.

7 Q. Take a look further down in Mr. Evan's memorandum under
8 the heading current funding pressure. Do you see that?

9 A. Uh-huh.

10 Q. And I'll read you the first sentence there, "Three funding
11 pressures currently exist that are putting pressure on the
12 original bonus pool estimate of 1.4 billion, assumed to exclude
13 funding for deferred cash awards." Do you see that?

14 A. Yes.

15 Q. Okay. Does that refresh your recollection or affect your
16 view, sir, that the 1.4 billion dollars wasn't the plan all
17 along?

18 A. I think what he's suggesting here is that the 1.4 billion
19 is the cash plan.

20 Q. I think what I'm asking about is the phrase original bonus
21 pool. This was always the plan bonus pool, isn't that right,
22 Mr. Ricci, 1.4 billion dollars. It was always 600 million
23 below what the Court was told?

24 A. Not that I recall. I think what he's trying to
25 distinguish here is the cash component of the pool versus

1 deferred cash awards. You'll have to ask Mr. Evans but I don't
2 recall that the 1.4 billion was always the number.

3 Q. Have you ever seen a number above two billion dollars in a
4 calculation of what bonuses would be paid?

5 A. Not that I recall.

6 Q. Okay. You agree with me, sir, that the 600 dollar (sic)
7 difference between 1.4, if that was the pool, and two billion
8 that was agreed would be gained to Barclays, yes? Less money
9 that it spent?

10 A. Well, again, you have to ask Mr. Evans but I'd be curious
11 as the 1.4 billion plus the 305 million of deferred cash award
12 plus another 111 of second year's could have been the total
13 number versus that two billion.

14 Q. And that brings you how much closer to two billion, sir?

15 A. Four hundred million.

16 Q. Okay. Do you know how much ultimately was spent on
17 bonuses or would I have to ask Mr. Evans that too?

18 A. I believe it was around two billion dollars, 1.95, two
19 billion.

20 Q. Cash or all elements?

21 A. I don't recall if that was cash or everything.

22 Q. And with regard to the assumed liabilities generally, sir,
23 time and attention was spent during that week toward finding a
24 way to get as much flexibility as Barclays could and spending
25 as little as possible against those estimates, is that right?

1 A. Are we talking about the cure?

2 Q. I'm talking about both.

3 A. Both.

4 Q. Assumed liabilities as a whole.

5 MR. GAFFEY: We can take it off the screen.

6 A. Again, we certainly wanted to be -- have our maximum
7 exposure. And yes, as I said earlier, if we didn't have to
8 spend it we didn't want to spend it.

9 Q. Okay sir, we're later in the week. We're at the repo; we
10 can talk about that now. There came a time, Mr. Ricci, when
11 Barclays, to use a phrase others have used, stepped into the
12 shoes of a repurchase agreement between the Fed and Lehman
13 Brothers, correct?

14 A. Yes.

15 Q. Okay. And what happened in that transaction was that on
16 the 17th of September Barclays did agree to take over the repo
17 because the Fed had insisted that it do so, yes?

18 A. Sorry; is that the Tuesday?

19 Q. That's the Wednesday.

20 MR. GAFFEY: Can you put up the calendar, please.

21 A. I think the Wednesday -- the conversation started on
22 Tuesday when the Fed called us.

23 Q. Okay. And on the Wednesday the agreement's made to do it,
24 yes?

25 A. I think that's correct. Yes.

1 Q. Okay. And the Fed repo would issue there, sir,
2 constituted an advancement of forty-six billion or so in cash
3 by the Fed to Lehman and the Fed holding 50.6 billion in
4 collateral, is that right?

5 A. I think it was forty-five billion in cash. That's what I
6 recall.

7 Q. Do you recall a number in the range of 50.6 billion in
8 collateral?

9 A. It was forty-nine or fifty in collateral.

10 Q. And when it took over the repo, Barclays advanced forty-
11 five billion to Lehman, yes?

12 A. Yes.

13 Q. And it was supposed to receive back approximately fifty
14 billion in collateral, yes?

15 A. Yes.

16 Q. And owing to certain operational difficulties, the entire
17 fifty billion collateral bucket did not make it to Barclays,
18 correct?

19 A. That's correct.

20 Q. And the difference between the amount of collateral that
21 made it over and the amount that was supposed to make it over
22 was approximately seven billion dollars, correct?

23 A. That's correct.

24 Q. And the agreement was made that at least temporarily
25 Lehman would supply seven billion in cash till certain

1 securities could be released or loosened up from an account
2 where they were held by JPMorgan, yes?

3 A. Yes.

4 Q. And the seven billion in cash was advanced by Lehman to
5 Barclays, correct?

6 A. Yes.

7 Q. Bringing the total value given to Barclays in that repo
8 the forty-two billion or so that made it over plus the seven
9 billion in cash, yes?

10 A. The notional value.

11 Q. Well, we'll come in a moment to the value, I take your
12 point. The numbers at the time said forty-two billion or so
13 made it over. That was Lehman's value, yes?

14 A. That was JPMorgan's value, the Fed's value and Lehman did
15 the -- there were several marks on that valuation, yes.

16 Q. And they were in the range of forty-two billion, yes?

17 A. Yes.

18 Q. And -- now JPMorgan valued the repo collateral as the
19 collateral agent in the repo between the Fed and Lehman,
20 correct?

21 A. Correct.

22 Q. And you understand that's the job of the collateral agent,
23 is it not, to calculate the value of the assets in the repo?

24 A. Correct.

25 Q. And the Fed, itself, valued the -- the Fed valued the

1 collateral in the repo as well, correct?

2 A. At one time, yes.

3 Q. You came to understand that later in the year when there
4 was a certain settlement presented to this Court, yes?

5 A. Yes.

6 Q. And you came to understand that the Fed had put a value on
7 the repo collateral?

8 A. Yes.

9 Q. Okay. And when the collateral in the Barclays/Lehman repo
10 was transmitted, it was valued by Bank of New York as
11 collateral agent, correct?

12 A. Correct.

13 Q. And Barclays had selected Bank of New York as the
14 collateral agent for that tri-party repo, correct?

15 A. That's correct.

16 Q. And Bank of New York served as Barclays' agent in that
17 regard to value the collateral for it, correct?

18 A. Yes.

19 Q. And you recall that Bank of New York put a value on the
20 repo collateral of about forty-five billion dollars that
21 actually made it over, correct?

22 A. Yes, I believe that's correct.

23 Q. Okay. And with the forty-five billion plus the seven
24 billion cash, that would put the value of what Barclays
25 received at roughly fifty-two billion dollars, correct?

1 A. I don't recall exactly the fifty-two but that --

2 Q. Okay. Well, even with my meager math skills, sir, we can
3 agree that forty-five plus seven is fifty-two, yes?

4 A. Yes.

5 Q. Okay. So if the Bank of New York valuation, Barclays'
6 agent, Bank of New York, values the repo at forty-five, repo
7 collateral at forty-five, and then seven billion cash is
8 advanced, Barclays has fifty-two billion, yes?

9 A. In notional value.

10 Q. In notional value. Well, notional value, sir, or the
11 value that's applied to it by your agent Bank of New York?

12 A. Well, we had issues with those marks and all the other
13 marks given the environment.

14 Q. On the Bank of New York valuation, sir, that wasn't face
15 value, right? That was a valuation applied by Bank of New York
16 to the collateral, correct?

17 A. That was Bank of New York's marks, yes.

18 Q. Yes. Okay. And so it was not -- it wasn't face value?
19 It was a market valuation done by Bank of New York, yes?

20 A. In their view, yes.

21 Q. You might agree or disagree with it, sir, but you do agree
22 with me that it was a market value calculated by Bank of New
23 York?

24 A. It was a market value calculated by Bank of New York.

25 Q. And it was a market value calculated by Bank of New York

1 as the collateral agent that Barclays had appointed, correct?

2 A. Correct.

3 Q. And if you add the seven billion in cash to that we're at
4 fifty-two billion to Barclays, correct?

5 A. Correct.

6 Q. Okay. And you agree sir, that when the Fed put a value on
7 the collateral in its repo, the Fed repo, the Fed had no agenda
8 here, it wasn't acting for Lehman or for Barclays; it was an
9 independent valuation, yes?

10 A. Yes. But I -- again, I think it's important to add
11 context to that time. In dialogue with the Fed, you know, they
12 would admit that they -- you know, their marks, not sure how
13 fresh they were, et cetera. They were busy with other things.

14 Q. So I'm told.

15 A. Sir. Would you take a look at tab 119 in your book? It's
16 Movants' Exhibit 119, in evidence. And it is a motion under 11
17 U.S.C. Section 105 and 363, et cetera, et cetera. Let me know
18 when you've gotten to that document.

19 A. Sorry. Does it follow Movant 92?

20 Q. It's Movant 119.

21 (Pause)

22 A. 119.

23 Q. Sir, you know, I'm told it's in the pocket part of yours.

24 A. Oh, okay.

25 Q. Now I mentioned before, sir, a certain settlement

1 agreement that was brought to this Court and you, I think, told
2 me you remember that, yes?

3 A. Yes.

4 Q. Okay. And the dispute that was being settled at the time,
5 sir, was a dispute -- well, broadly speaking, was a dispute
6 between Barclays and JPMorgan over who's entitled to the seven
7 billion, yes?

8 A. Yes.

9 Q. And that was resolved, ultimately, by an agreement that
10 this Court approved -- that was submitted to this Court for
11 approval, yes?

12 A. Yes.

13 Q. Okay. And you signed the settlement agreement that we're
14 talking about, yes? Take a look through it and I'm sorry, sir,
15 this is not Bates numbered so if you could just leaf through it
16 until you get to the document entitled settlement agreement and
17 then go to the signature page.

18 (Pause)

19 A. Yes.

20 Q. Okay. That is your signature for Barclays Capital?

21 A. Yes.

22 Q. All right. So now you recall signing this settlement
23 agreement between JPMorgan, the trustee, SIPA and Barclays,
24 yes?

25 A. Yes.

1 Q. All right. And do you recall this motion being submitted
2 at the time?

3 A. Yes.

4 Q. All right. And if you'd turn further, sir, to the
5 declaration of Shari Leventhal?

6 A. Yes.

7 Q. Let me know when you've gotten there.

8 A. I'm there.

9 Q. Okay. And Ms. Leventhal lays out for the Court certain
10 events concerning Barclays stepping into the Fed's shoes on the
11 repo. And she says, if you go to paragraph 9 of her
12 declaration, and again I apologize, sir, that doesn't have page
13 numbers so you'll just have to work with me on the paragraph
14 numbers. Let me know when you're there.

15 A. I'm there.

16 Q. And she says overnight on September the 17th and she
17 describes certain exposures. And then she says the following:
18 "In total, the New York Fed had funded 46.22 billion in cash
19 and treasury securities against 50.62 billion in collateral."
20 Do you see that?

21 A. I do.

22 Q. And Ms. Leventhal doesn't express doubt or concerns or
23 equivocation about the Fed valuation of the value of the repo
24 collateral, does she?

25 A. No.

1 Q. And you didn't point out to her at the time that they had
2 been expressing equivocation. You read this as the unequivocal
3 statement that it is, isn't that right?

4 A. Excuse me. The 17th is what day?

5 Q. That's the Wednesday, sir.

6 A. The Wednesday. Okay.

7 Q. And my question was, you didn't speak up and say, wait a
8 minute, you've been more equivocal about that value. You took
9 that at face value as it was meant to be taken, right?

10 A. That was the Wednesday night. That was their marks, their
11 books. We transacted this on a Thursday night.

12 Q. I'm sorry. I can't hear.

13 A. We transacted this on a Thursday. So I would have no
14 basis to dispute our marks on the Wednesday.

15 Q. You have no basis to dispute that on those marks the Fed
16 came to an independent valuation of 50.62 of the collateral and
17 the repo, yes?

18 A. On the Wednesday, correct.

19 Q. Excuse me one moment, sir. I'm a little bit lost.

20 (Pause)

21 THE COURT: At some point, when you're done with this
22 particular area of questioning, we'll be taking an afternoon
23 break.

24 MR. GAFFEY: Now would be just fine, Your Honor.

25 THE COURT: Okay. Let's break for ten minutes.

1 (Recess from 3:25 p.m. until 3:38 p.m.)

2 THE COURT: Be seated, please. We're going to be
3 taking another break in approximately one hour so that we can
4 have a substitution of reporters in order to accommodate going
5 past 5:30 this evening.

6 THE REPORTER: Thank you, Your Honor.

7 THE COURT: So at approximately an hour from now,
8 we'll take another break for about five minutes.

9 RESUME DIRECT EXAMINATION

10 BY MR. GAFFEY:

11 Q. And, Mr. Malloy (sic), before the break we were talking a
12 bit about the Bank of New York values that were applied to the
13 repo collateral, the Fed values that were applied to the repo
14 collateral, and you allowed as how you had some level of
15 disagreement with the Bank of New York valuations, did I
16 understand that correctly?

17 A. Yes.

18 Q. The fact of the matter is that at least as of the 19th of
19 September, the day of the sale hearing in this case, Barclays
20 was calculating the value of the repo based on those Bank of
21 New York marks, isn't that correct?

22 A. What were they calculating again? Sorry.

23 Q. The value of the repo --

24 A. On the 19th --

25 Q. -- collateral.

1 A. -- which was the --

2 Q. On the 19th. It was the Friday, sir.

3 MR. GAFFEY: Steve, could you put the calendar up?

4 Q. We're just going to keep that up there unless there's an
5 exhibit, sir, because I need it occasionally myself. But take
6 a look at Friday the 19th. As of Friday the 19th, sir,
7 Barclays was valuing the collateral in accordance with the
8 values applied to it by its agent, the Bank of New York,
9 correct?

10 A. What were they valuing?

11 Q. The capital structure in the repo.

12 A. In the repo?

13 Q. Yes.

14 A. I think there was various views on the -- that would have
15 been one thing we used. I think we used others as well.
16 Again, the markets were quite uncertain at the time.

17 Q. So I'm told. But the values, sir, that Barclays was using
18 on the 19th of September 2008 with regard to the collateral and
19 the repo were the Bank of New York values, correct?

20 A. For what purposes, sir?

21 Q. Well, to talk, for example, about how much excess
22 collateral there was in the repo. Let me show you Exhibit
23 M-200 in evidence, sir. Would you turn to that in your book?
24 And we'll put that up on the screen. We're going to blow the
25 whole e-mail up, sir, so it's a little easier to see on the

1 screen, but -- and I know you're not an addressee or an author
2 of this but you do know who -- Stephen King worked for you,
3 yes?

4 A. Stephen --

5 Q. On this project?

6 A. He worked as part of my team, yes.

7 Q. All right. And Mr. LaRocca was part of the team, yes?

8 A. Yes.

9 Q. And you see that in this e-mail in evidence they are --
10 it's entitled: "Totals for the Fed facility collateral", yes?

11 A. Yes.

12 Q. And Marty Malloy is totaling that up, correct? That's
13 what the e-mail says.

14 A. Yes.

15 Q. Okay. And you see that Mr. Malloy has applied -- has
16 concluded that there is 7.19 billion what he calls excess
17 collateral in the repo, do you see that?

18 A. I see on the page, yes.

19 Q. And when he calculates the collateral in the repo in the
20 upper section there he adds, "The Fed wire securities, DTC
21 cash, DTC cash". You see all that? That's the collateral
22 that's in there, yes?

23 A. I don't know what Mr. Malloy was meaning. I haven't seen
24 this e-mail before. I don't know whether this is the actual
25 assets we got or --

1 Q. Actually, I don't want you to speculate. I don't mean to
2 interrupt, sir, but if you haven't seen it before I don't want
3 you to speculate about its meaning.

4 A. Okay.

5 Q. What I would like you to agree with me about, sir, is if
6 there is excess collateral in the repo that's something of a
7 cushion, is it not?

8 A. Against -- yes, that's correct.

9 Q. Okay. Now, instead of looking at Mr. Malloy's e-mail,
10 let's look at Exhibit M-362, also in your book, sir. And
11 that's dated September 20th. That would be the Saturday after
12 the sale hearing is over. You see that?

13 A. Yes.

14 Q. And it's a series of e-mails. Beginning at the bottom
15 there's one to you and then there's one from Michael Klein.
16 And at the top -- the second from the top actually, it's from
17 you to Michael Klein, entitled "Accruals". Do you see that?

18 A. Yes.

19 Q. And you write there, "Pretty convinced resis not in
20 fifty-two after talking to a few people." Do you see that,
21 sir?

22 A. Yes.

23 Q. Now, you understood that by the Saturday there was some
24 concern -- there was some issue as to whether or not certain
25 resis were included or not included in the repo collateral,

1 correct?

2 A. That's correct.

3 Q. And that's what you're referring to here in your e-mail to
4 Mr. Klein, another senior member of the team?

5 A. Yes.

6 Q. And the fifty-two that you're referring to there, sir, is
7 the total value of the collateral in the repo plus the seven
8 billion dollars, isn't it?

9 A. It's the -- we're referring to that set of assets, those
10 values I used all week. But yeah, in this e-mail I'm referring
11 to that set of assets, yes.

12 Q. So on the 20th of September you were putting those assets
13 in the range of fifty-two, yes?

14 A. Yes, in this note among others.

15 Q. Now, the fact is, sir, whatever disagreements Barclays may
16 have developed later with the Bank of New York marks, it took
17 the collateral in the repo in at the Bank of New York marks,
18 isn't that right?

19 A. When you say "we took it in" --

20 Q. They put it on Barclays' books using the marks its agents
21 had applied to the value of the repo collateral, isn't that
22 right?

23 A. I don't recall us putting -- or recording on our books
24 that following day. I don't -- I don't know what the values we
25 assigned were.

1 Q. Okay. Well --

2 A. I don't recall anyway.

3 Q. -- let me ask you to take a look, sir, at Exhibit 228,
4 sir, in your book. You see that? Are you there?

5 A. Yes.

6 Q. All right. And in Exhibit -- and Exhibit 228 in evidence
7 at the top has an e-mail from you to Patrick Clackson?

8 A. Yes.

9 Q. Subject: Long Island draft balance sheet?

10 A. Yes.

11 Q. And Long Island was the code for this transaction?

12 A. That was a reference to Lehman, yes.

13 Q. You don't know who -- well, in any event, below that is an
14 e-mail change from Mr. Clackson you, and below that from Mr.
15 Romain to you. Do you -- are you following through there with
16 me, sir?

17 A. Yes.

18 Q. And you see that attached to this chain of e-mails is a
19 draft balance sheet purporting to -- entitled "Acquisition
20 summary". Do you see that, sir?

21 A. Yes.

22 Q. And would you take a look at the acquisition summary, and
23 in particular -- well, do you recall getting this acquisition
24 summary?

25 A. Yes.

1 Q. Okay. And you understood that Mr. Clackson, in his e-mail
2 to you, was giving you some idea of where things stand by way
3 of calculating negative good will out of the assets acquired,
4 yes?

5 A. Yes.

6 Q. He's talking about how to squeeze a little bit more
7 negative good will out of the assets, yes?

8 A. Yes.

9 Q. And you'll see that in the acquisition summary -- well,
10 back on the cover e-mail, sir, there's a reference in Mr.
11 Romain's e-mail to you, Mr. Clackson and a James Walker which
12 says, "The 2.83 billion valuation adjustment is S. King's first
13 cut only." Do you see that?

14 A. Yes.

15 Q. And you understood that to be a reference to Stephen King?

16 A. Correct.

17 Q. He's one of the valuation people on the team, yes?

18 A. That's correct.

19 Q. And Mr. King was spending his time coming up with values
20 for the collateral that by now Barclays has acquired, yes?

21 A. Yes.

22 Q. Because the transaction has closed. And you'll see that
23 the valuation adjustment to which Mr. Romain's e-mail refers is
24 at line 16 of the acquisition summary on the next page. Do you
25 see that?

1 A. Yes.

2 Q. And do you understand, sir, that the valuation adjustment
3 to which that line refers is an adjustment against the value of
4 the repo collateral?

5 A. You'll have to ask Mr. King, but by looking at this page
6 it looks like it's a deduction from that, yes.

7 Q. Okay. It's a deduction from that. And it's, at least
8 according to Mr. Romain, Mr. King's first cut at a reduction,
9 yes?

10 A. For Mr. Romain, yes.

11 Q. All right. And you see that that item on the acquisition
12 summary is footnoted to footnote 5? Are you with me, sir?

13 A. Yes.

14 Q. I can blow it up on the screen.

15 A. No, that's okay, I got it.

16 Q. Okay. And -- it's going to get a little worse, we're
17 going to go to footnote 5.

18 A. Okay.

19 Q. And we're going to blow that up on the screen as big as we
20 can. And we're going to highlight line 55. Now, the footnote
21 to which that valuation adjustment refers to, sir, says,
22 "Trades are initially booked at BoNY prices. 2.83 billion is
23 initial estimate of the adjustment Barclays marks". Do you see
24 that?

25 A. I do.

1 Q. Does that suggest to you, sir, that the BoNY marks, the
2 Bank of New York marks were the marks that Barclays initially
3 used to value what it acquired, and only after that did it
4 begin to write them down?

5 A. No, we had -- as I said, we had issues throughout the week
6 with the BoNY marks, and I don't know -- we didn't end up final
7 reconciliation of the day one balance sheet until February of
8 the following year, I think. So we had issues through the
9 week.

10 I'm not saying that maybe BoNY wasn't an estimate we used,
11 but we had issues with their expertise and some of the
12 products. These were very highly structured geared projects,
13 difficult to price, no market -- really clear market prices to
14 use as an estimate. We had issues with them. I don't think
15 we -- again, you have to ask technical accountants but I don't
16 think we recorded things at BoNY prices. We certainly weren't
17 using it as an estimate. But we had issues with them,
18 certainly.

19 Q. Where it says, sir, "Trades are initially booked at BoNY
20 prices", don't you understand that to mean that they were taken
21 in at the BoNY mark?

22 A. I don't know if they were taken in at the BoNY marks or
23 not.

24 Q. Do you have any other explanation for footnote 5?

25 A. He may be referring to "booked" as reflecting on how he's

1 booked them on his balance sheet -- or on his spreadsheet.

2 Q. Or how he booked them on the day of the closing?

3 A. You have to ask Mr. King.

4 Q. You have no understanding of it, sir?

5 A. I don't recall this. I know we had issues with BoNY
6 prices --

7 Q. The phrase "Trades are initially booked at Bank of New
8 York prices" has no meaning to you?

9 A. I don't know what "booked" means in that sense. Is it
10 booked on this spreadsheet? Is it booked in the accounts? I
11 mean, there was a lot of technical accounting work around this
12 transaction.

13 Q. To take away all the technical accounting stuff
14 surrounding the transaction, sir, your view -- your view was
15 that it was fifty-two billion dollars worth of collateral. We
16 saw your e-mail before that referred to "in the fifty-two".

17 A. As I said, that was one of a number of characterizations
18 of the collateral that week. I referred to it as fifty-two.
19 I'm sure in conversations I referred to it as forty-five. I'm
20 referred to it just as collateral. There was varying issues
21 with the marks and the valuation of those securities.

22 Q. Well, when you referred to it as the forty-five, sir,
23 that's just subtracting the seven billion dollar cash, right?

24 A. No, not necessarily.

25 Q. So one moment it'd be forty-five billion worth, the next

1 minute fifty-two billion worth and we just call it seven
2 billion dollar difference between friends? Sir, on the day you
3 wrote the e-mail, you thought the collateral was worth fifty-
4 two billion dollars, didn't you?

5 A. The fifty-two billion dollars was a number that was used
6 to describe those assets. We used various numbers through the
7 week. We had issues with market values through that whole
8 week. It was difficult to price the inventory.

9 Q. As the man in charge of the transaction, sir, can you tell
10 the Court what steps, if any, you or the people working for you
11 took to bring to this Court's attention that the difficulties
12 in valuing the collateral could have resulted in a range from
13 forty-five billion to fifty-two billion?

14 A. Again, I asked my attorneys and advisors to make sure the
15 Court knew everything they were supposed to know and they
16 assured me that it was.

17 Q. I've got that, but let's be a little more specific about
18 this one, sir. Did you talk to anyone about making sure the
19 Court got an accurate description of the value of the assets
20 that Barclays was purchasing?

21 A. Again, I spoke to my attorneys. My attorneys were fully
22 appraised of this. It was an open process. Everyone knew
23 there was issues. Everyone knew the numbers. The attorneys
24 represented us in court what they thought they needed to
25 represent.

1 MR. GAFFEY: Move to strike to the extent the witness
2 purports to speak on behalf of what everyone knew, Your Honor.

3 THE WITNESS: Sorry --

4 THE COURT: I don't think I'm going to --

5 MR. GAFFEY: Mr. Ricci might --

6 THE COURT: I don't think I'm going to grant that
7 motion to strike, but I'm just going to disregard the answer.
8 It's in the record, but what this witness says everyone knew
9 obviously is simply his hyperbole. It can't possibly be his
10 knowledge.

11 MR. GAFFEY: Thank you, Your Honor.

12 Q. What steps did you take about this issue, sir -- this
13 issue, the value of the collateral that Barclays purchased. I
14 know you've told us that you've told your lawyers generally to
15 make sure everything got disclosed the way it should have been
16 disclosed. With respect to this particular issue, the value of
17 the collateral that Barclays purchased, what steps, if any, did
18 you take to make sure that value was accurately reported to
19 this Court?

20 A. I didn't take any specific actions other than the ones I
21 described generally.

22 Q. Now, isn't it a fact, sir, that it was only after the
23 assets had been taken in at the Bank of New York values that
24 Barclays began a process of writing those values down through
25 its PCG group?

1 A. We had concerns about those marks from the beginning and
2 analysis was started as early as Thursday to try to figure out
3 what we believed the value of that collateral was that the Fed
4 was holding. Once we found out on Wednesday that we had to put
5 out the forty-five billion dollars, we wanted to understand
6 what the collateral was and we asked our people to try to get a
7 listing from Lehman to try to value it. So I think we had
8 concerns. I mean, when you finally get to the books and
9 records you'll have to ask Mr. Clackson about the role of the
10 product control group and how they finally recorded those
11 activities.

12 Q. Did there come a point on --

13 MR. GAFFEY: Can I have the calendar up there, please,
14 Steve?

15 Q. Did there come a point, sir, where personnel at Barclays
16 began to look at the value that the Fed had put on the repo
17 collateral, that 50.6 that it has put on the collateral in its
18 repo, and to apply haircuts to it to come to a better view of
19 the value?

20 A. We were doing analysis, yes, to look at the values in
21 terms of what we believe the market value was.

22 Q. And that analysis was done by a Mr. Yang, is that right?

23 A. Mr. Yang, he worked for Mr. King. I recall an e-mail from
24 Mr. Yang.

25 Q. And if you would look in your binder, sir, at tab 45

1 you'll find Movants' Trial Exhibit 45 in evidence. Are you
2 with me, sir?

3 A. Yes, sir.

4 Q. And you see that that is an e-mail -- the top e-mail is
5 from Patrick Clackson to you on the 19th of September 2008 --

6 A. Yes.

7 Q. -- entitled "Haircut summary"?

8 A. Yes.

9 Q. Do you have an understanding of what a haircut is, sir, in
10 the context of a repurchase agreement?

11 A. Yes.

12 Q. What is it?

13 A. It's a discount to the values to account for, you know,
14 cushion against delivery of those values or something else
15 might going wrong.

16 Q. Okay. It's the difference between the amount of cash
17 advanced and the greater amount of collateral deposited, yes?

18 A. Yes.

19 Q. Okay. And attached to this -- and Mr. Clackson forwards
20 to you an e-mail from Jason Yang to Mr. Clackson, copying King,
21 John Mahon, and Mike Keegan.

22 A. John Mahon works in our counterparty management group.

23 Q. Okay. And does he work with Mr. King and Mr. Keegan.

24 A. They work together.

25 Q. Okay.

1 A. Not for the same -- not in the same area, but yes, they're
2 colleagues.

3 Q. Okay. And was Mr. Mahon involved in any activities around
4 the transaction?

5 A. As I recall, he probably was involved in some of the
6 valuation activities.

7 Q. Do you know if he ever had a conversation with a man named
8 Mr. Seery?

9 A. I don't know.

10 Q. In any event, Mr. Yang sends to Clackson this haircut
11 summary. Is this the document you're talking about, the one
12 that Barclays prepared?

13 A. I don't know if Barclays prepared it, but it came from Mr.
14 Yang.

15 Q. Do you know one way or the other whether Barclays prepared
16 it?

17 A. I don't know whether Barclays prepared it, no, but I'm --

18 Q. Do you know the purpose for which it was prepared? I'm on
19 the second page of the document.

20 A. I believe, and again, I don't know where it came from, but
21 I believe this was the calculation on the haircuts associated
22 with what was supposed to be delivered from the Fed.

23 Q. As I understand -- that's a good point, sir. As I
24 understand it, the collateral that was supposed to be delivered
25 once Barclays stepped into the shoes of the Fed was supposed to

1 be substantially the same collateral, yes?

2 A. It was supposed to be the same collateral.

3 Q. As it turned out, it was not entirely the same collateral,
4 but that was the idea at the beginning, yes?

5 A. That's correct.

6 Q. Okay. And this, you understand, is a valuation of what
7 was the Fed repo collateral, yes?

8 A. What was supposed to be received, the Fed repo, yes.

9 Q. Okay. And the 50.64 billion dollar number you recognize
10 now to be the 50.6 number that the Fed put on the repo when it
11 valued the collateral, yes?

12 A. Yes.

13 Q. Okay. And the haircuts to the right are a reduction in
14 that value, yes?

15 A. Yes.

16 Q. And you don't know one way or the other whether this
17 document was prepared by before, is that your testimony?

18 A. I don't know if it was prepared by Barclays or Lehman. I
19 know that -- well, I don't know whether -- it came from Jason
20 Yang but I don't know where the underlying information came
21 from and I don't know whether he prepared it or was just
22 passing it on.

23 Q. Okay. You know it goes from Yang to Clackson and then
24 Clackson to you, right?

25 A. Yes.

1 Q. Okay. And it clearly has something to do with this
2 transaction, yes?

3 A. Yes.

4 Q. And what it has to do with this transaction is Barclays is
5 looking at the value of the collateral that it at least
6 expected to receive, yes?

7 A. Yes.

8 Q. And it's doing that on the 19th of September, at least
9 according to the date on Mr. Yang's e-mail to Mr. Clackson and
10 Mr. Clackson's e-mail to you, right? One is 9:20 and the other
11 is 9:42 a.m.

12 A. That would be --

13 Q. You with me?

14 A. Yes.

15 Q. Okay.

16 A. That's about 5 -- that's a quarter of 5 in the morning New
17 York time.

18 Q. And the purpose of your reviewing this haircut summary,
19 sir, is it not, is that so you can send it off to Lehman with
20 whom you are negotiating to say -- to show them that in
21 Barclays' view there's not enough value in the repo collateral,
22 yes?

23 A. As I recall -- again, this would have started earlier in
24 the day on Thursday when we agreed to step into the Fed's
25 shoes, anticipating in the environment where values were,

1 values are dropping, let's get a hold of the listing of what's
2 on the books at the Fed for this repo and let's see what the
3 value is from our view just to protect ourselves.

4 Q. Okay. To protect ourselves by coming up with a view on
5 what the haircut should be, yes?

6 A. Yes.

7 Q. And the view that Barclays comes up with to protect itself
8 totals out to 6.04 billion dollars once you total up the
9 haircuts taken off those classes of assets, yes?

10 A. I don't recall if it was Barclays -- if this was Barclays'
11 analysis or someone else's analysis, but there's a 6.4 billion
12 dollar haircut, yes.

13 Q. And I think, sir, my question went to whether this
14 document was then delivered to you so you could talk to the
15 folks at Lehman about the Barclays view that it needed more
16 assets because it wasn't adequately collateralized in the repo.

17 A. I would have taken this document and either given it to
18 Mr. Keegan -- certainly would have given it to Mr. Keegan and
19 would've, yes, used it to talk to Lehman about I was very
20 worried about the value of the assets, yes.

21 Q. Okay. Because that was a topic of great concern to
22 Barclays on the morning of the 19th of September, correct?

23 A. Yes.

24 Q. Barclays took the view that it was unhappy, it was
25 uncomfortable with the value of the repo collateral, yes?

1 A. Of what was supposed to be delivered, yes.

2 Q. Okay. And the repo had essentially become the center of
3 the transaction, yes? The assets were all in there, correct?

4 A. Yes, all the other assets were disappearing.

5 Q. Okay. And your understanding is you would have given this
6 to Mr. Keegan. You knew Mr. Keegan was dealing with
7 counterparts at Lehman about this topic, right, whether or not
8 Barclays was receiving enough value in the deal, correct?

9 A. Yes, I would have had a conversation with Mr. McDade as
10 well, to be clear.

11 Q. Well, and you had conversations with Mr. McDade, you had a
12 conversation with Mr. Lowitt about that too, didn't you?

13 A. I don't recall having with Mr. Lowitt.

14 Q. Okay. Do you recall having a conversation with Ian Lowitt
15 on the morning of the 19th of September about a project to
16 gather more value to ensure that Barclays could close?

17 A. I remember having that conversation with Mr. McDade. I
18 don't know -- Mr. Lowitt may have been in the room, yes.

19 Q. And this document is given go Mr. Keegan so that in his
20 discussion with his counterparts he can engage in a discussion
21 about what needs to be added to make up for a purported
22 inadequacy in the value of the repo collateral?

23 A. That's what I recall. We were looking to identify
24 additional assets, yes.

25 Q. And you, in fact, sir, send Michael Klein, Barclays'

1 advisor, to go in and get more assets, yes? You gave him those
2 instructions?

3 A. Yes.

4 Q. And those instructions and Mr. Keegan's involvement all
5 revolve around the Barclays' view that it's not getting enough
6 value, correct?

7 A. Correct.

8 Q. So you make it known yourself, and through others working
9 for you, that if Lehman does not add more value to this
10 transaction to Barclays' satisfaction Barclays is not going to
11 close, correct?

12 A. I said there's a possibility Barclays wouldn't close, yes.

13 Q. Well, a possibility, sir? What was the possibility? If
14 there was not enough value added Barclays wouldn't close, yes?

15 A. We couldn't put Barclays in harm's way and if the value
16 was negative it would've -- I mean, we were stuck with the repo
17 at this point, but yes, we would have -- there's a possibility
18 we wouldn't have closed.

19 Q. Is that how you put it to Mr. McDade, there's a
20 possibility --

21 A. I don't --

22 Q. -- we won't close?

23 A. I don't recall my words.

24 Q. You understood, sir, that personnel at Lehman scrambled
25 around on Friday morning --

1 A. Yes.

2 Q. -- and added approximately three billion dollars more to
3 this deal?

4 A. Can you refer to what the three billion is? I know we had
5 additional assets, yes.

6 Q. Okay. What was your understanding of the amount of
7 additional assets that were added?

8 A. I believe we added the clearance box which was at the time
9 valued at something around 1.9 billion. And I think there was
10 the 15c3 which was -- there was a large range of estimates
11 around that, but three billion may have been a number.

12 Q. Okay.

13 A. There's clearly additional assets identified.

14 Q. All right. Well, on the Friday the 15c3 number is larger
15 than -- let me do that the other way. Over the weekend that
16 15c3 number crystallizes at 769 million, do you recall that?

17 A. Yes.

18 Q. Okay. But on the Friday the number was considered to be
19 larger because at that point there was an issue about whether
20 cash including the 15c3 component would go over, yes?

21 A. Yes, I think that number was around two billion.

22 Q. So the number everybody's looking at on Friday morning the
23 19th was something between three and four billion dollars more?

24 A. That's correct.

25 Q. Sir, do you think the personnel at Lehman scrambled around

1 to find three to four billion dollars more in assets because
2 Barclays might not close or because, I suggest to you, Barclays
3 said it would not close if more value wasn't added to the deal?

4 A. They certainly scrambled around to ensure that we closed.

5 Q. And they did that because you and the other Barclays
6 negotiators said you would not close if more assets were not
7 added, isn't that right?

8 A. I don't remember if I was that definitive, counselor, but
9 they certainly did scramble around to ensure we closed.

10 Q. Do you know if Mr. Klein ever told that to the Lehman
11 folks, "We're not closing unless there's more value"?

12 A. I don't recall if Mr. Klein said that, you have to ask
13 him.

14 Q. Is it your testimony you never had a conversation with
15 Klein where he reported that to you?

16 A. I don't recall.

17 Q. In any event, we are agreed that on the Friday morning
18 Barclays demands more assets, yes?

19 A. Yes, sir.

20 Q. And the assets that are added to the deal include the
21 clearance box at 1.9 billion dollars, yes?

22 A. 1.9 billion is my recollection.

23 Q. If I didn't say that I should have.

24 A. Right.

25 Q. The clearance box at 1.9 billion dollars, yes?

1 A. Yes, yes.

2 Q. And the 15c3 assets at, as it turns out, 769 million, yes?

3 A. Yes.

4 Q. And those assets are added over and above the amount that
5 is repo collateral, yes?

6 A. Yes.

7 Q. And to your knowledge, sir, even in your absence, you're
8 not present at the hearing, a total was reported to the Court
9 of assets that were being transferred to Barclays as part of
10 the transaction, is that correct?

11 A. Sorry, you threw me with --

12 Q. You know that someone gave the Court a number about the
13 value of the assets that were to be transferred, yes?

14 A. Yes.

15 Q. Okay. You know what question's coming, sir. What steps
16 did you take, as the guy in charge of the deal, to make sure
17 that that number was accurately reported to the Court?

18 A. As I said, I mean, I talked to my attorneys and my
19 advisors to make sure they disclosed everything to the Court.

20 Q. Now, when this search for additional assets was going on,
21 on Friday morning, it was at Barclays' -- let's pick a verb --
22 request? Barclays asked for more assets, right?

23 A. Yes, we wanted to understand if there's any other assets
24 that could be identified as part of the sale --

25 Q. Okay.

1 A. -- that were coming with the deal, yes.

2 Q. And let's bump it up a little from "request", Barclays
3 actually demanded that more assets be added, right?

4 A. Yes.

5 Q. Okay. And no actual numerical target was given to the
6 Lehman people as to how much needed to be added, is that right?

7 A. I don't recall giving a specific number.

8 Q. Okay. You do recall having discussions with the folks at
9 Lehman about more assets needing to be added to the deal, yes?

10 A. Yes.

11 Q. And there was no set number, no target that you or anyone
12 on the Lehman side -- on the Barclays side of the table gave,
13 yes?

14 A. Not that I recall.

15 Q. Well, whether you recall the number or not now, sir, do
16 you recall whether or not a number was given?

17 A. I don't recall if there was a specific number given.

18 Q. Do you recall a conversation -- well, is it your
19 recollection that you didn't have a specific number?

20 A. There was real uncertainty. We had real issues with the
21 value of the collateral.

22 Q. I --

23 A. I wanted to make sure that we were comfortable. I
24 didn't -- don't recall having a specific number in time. I
25 wanted to make sure that I felt comfortable that we had enough

1 protection.

2 Q. And beyond making you comfortable, sir, that Barclays had
3 enough protection, what I'm trying to find out here is if there
4 was anything more precise than that as the standard used on
5 Friday when additional assets were identified. Was the test,
6 sir, keep adding assets till Barclays says to stop?

7 A. I wanted to make sure that we had enough cushion. I
8 don't -- there was no directive that said keep adding until I
9 say stop or -- I don't recall a specific number.

10 Q. Did there come a point -- one of the men you were dealing
11 with was Alex Kirk?

12 A. Yes.

13 Q. Did there come a point where you said to Mr. Kirk, "We're
14 not going to be pigs and go after every last nickel"?

15 A. Yes.

16 Q. And was that the test, sir? Was that the test of how much
17 had to be added in terms of additional value?

18 A. No, because again, we had all kinds of issues around
19 value. That exchange with Mr. Kirk was around -- he was very
20 worried that we weren't going to close and that he -- I mean,
21 they felt a lot of pressure from their people. And the issue
22 was, you know, we've done the best we can, that's all there is
23 that we can find, you know, we want to close the deal. And I
24 said, "We won't be pigs, fine, let's get on with it."

25 Q. And all of this was done prior to the commencement of

1 the -- it was done in the morning of the 19th, yes?

2 A. The --

3 MR. GAFFEY: Let me withdraw that. That might be
4 misleading.

5 Q. Do you know when Barclays was satisfied that enough
6 additional assets had been added?

7 A. I believe I had a final conversation with Mr. McDade, Mr.
8 Kirk -- I think Mr. McDade was on his way to court.

9 Q. So I take it then that your understanding is a resolution
10 was reached of this prior to the commencement of the sale
11 hearing?

12 A. Yes.

13 Q. Was that one of the conditions in the morning, we have to
14 get this done before the sale hearing begins?

15 A. I don't recall if we specifically talked about that, but
16 we certainly knew the sale hearing was in the afternoon and we
17 wanted to make sure we had an agreement, yes.

18 (Pause)

19 MR. GAFFEY: Your Honor, if I could just take one
20 moment. There's one more document I need to find in my --

21 THE COURT: Take your time.

22 MR. GAFFEY: Thank you, Your Honor.

23 (Pause)

24 Q. If you could turn back to M-45, please, sir?

25 A. Yes, sir.

1 Q. Okay. It's so, sir, is it not, that the haircut summary
2 that was annexed to that e-mail was used as part of the
3 discussions with the Lehman folks on the morning of the 19th
4 about how much collateral was lacking, how big a whole needed
5 to be filled, yes?

6 A. I think we used this as part of the discussion, yes.

7 Q. And it's a fact, is it not, sir, that the position
8 Barclays took with respect to this analysis was the repo was
9 worth no more than 50.64 minus 6.04, putting you in the 44.5
10 range, yes?

11 A. The net range.

12 Q. Okay. And it's also a fact, is it not, sir, that Barclays
13 did not show or share its analysis, how it got to this number
14 with Lehman, it simply said in our view this is how much the
15 repo is undervalued.

16 A. If I recall correctly, I think we shared with Lehman,
17 based on our analysis -- and again, I don't know if this was
18 our analysis, where this information -- where the underlying
19 information came from, but I think we said "Based on our
20 analysis we think the repo is valued at forty-three, forty-
21 four" -- I don't remember exactly what the number was. And
22 Lehman said, "Well, we'll take a look at it as well", and they
23 went off and did an exercise as well.

24 Q. Would you take a look at -- they did an exercise off of
25 this?

1 A. No, I believe they then -- I'm thinking now, remember,
2 because this was based on what we were supposed to receive, and
3 I think what happened then was -- is that Lehman then ran an
4 analysis, I think, of what they actually -- what we did
5 actually receive and valued it.

6 Q. Would you take a look at Exhibit 147 in your binder,
7 please, Mr. Ricci?

8 A. Yes.

9 Q. Now, in your binder, sir, that's going to be a fairly fat
10 set of notes. I just want you to look at the last page. It's
11 Bates number 70. That's the number stamped on the lower
12 right-hand corner.

13 A. Yes.

14 Q. Now, you recognize that to be the same form of haircut
15 summary we were looking at a few moments ago?

16 A. Yes.

17 Q. And you'll see at the bottom there, you see it's that same
18 6.04 haircut? You with me?

19 A. Yes.

20 Q. Except on this one handwritten is 45.5 and 1.9 billion, do
21 you see that?

22 A. Yes.

23 Q. Now, to your knowledge, sir, that's the number that
24 results from this, what you called analysis that took place?

25 A. I haven't seen this before.

1 Q. Did you ever learn what the basis was for the Lehman
2 analysis that you just told us about?

3 A. No, it was done between the traders.

4 Q. Do you know that the traders applied liquidation values?

5 A. I didn't know what the traders did -- done between the
6 traders.

7 Q. Nobody ever told you?

8 A. I don't recall --

9 Q. Do you have any --

10 A. -- if they told me or not.

11 Q. I beg your pardon, sir. Do you have any clue what the 1.9
12 billion written on there is for?

13 A. No.

14 MR. GAFFEY: Your Honor, I have nothing further for
15 Mr. Ricci.

16 THE COURT: Anything from the other movants' lawyers?

17 (Pause)

18 UNIDENTIFIED SPEAKER: Your Honor, if I might
19 approach?

20 THE COURT: Sure. Thank you. Mr. Maguire?

21 MR. MAGUIRE: Thank you.

22 THE COURT: Excuse me. Mr. Maguire, before you begin,
23 do I need to keep this?

24 MR. MAGUIRE: Yes. You don't need that for right now.

25 THE COURT: Okay. Thank you.

1 CROSS-EXAMINATION

2 BY MR. MAGUIRE:

3 Q. Sir, as you know, my name is Bill Maguire and I represent
4 the SIPA trustee. I'd like to start, sir, by asking you to
5 turn to the small binder that I just provided you. And if you
6 would just look at the document on the inside tab, that's a
7 document that was presented to the Court this morning as
8 Barclays' Exhibit 838 by Barclays' counsel.

9 MR. MAGUIRE: And Your Honor, I apologize, I do not
10 have on the copy I've circulated the Barclays' exhibit sticker.
11 We only --

12 THE COURT: That's fine, I recognize this one.

13 Q. Sir, if you could take as much time as you need to read
14 this document and then I'll have some questions for you. And
15 if it helps you, sir, my questions will address exclusively the
16 second page of the document, the statement, the quotation of
17 Mr. John Varley towards the end of the first half of that page.

18 (Pause)

19 Q. Just let us know whenever you're ready to proceed, sir.

20 A. I will, thank you.

21 (Pause)

22 A. Yes.

23 Q. Sir, as the senior executive in charge of this
24 transaction, can you tell us whether the statement attributed
25 to Mr. Varley here is consistent with your understanding of the

1 transaction?

2 A. Can I ask you a question? What's the date of this
3 article? I don't see it dated.

4 Q. Regardless of the date, sir, I'm only asking you of your
5 understanding. Can you tell me whether this statement is
6 consistent with your understanding of the transaction?

7 A. The date's relevant because what we announced in the
8 market on September 17th is reflective of what Mr. Varley says
9 here.

10 Q. Is this consistent, sir, with your understanding of the
11 transaction that you understood you had negotiated at the end
12 of that hectic week that ended with Friday, September 19, 2008?

13 A. Not entirely consistent.

14 Q. What is Mr. Varley's position?

15 A. He's the chief executive of the Barclays group.

16 Q. And it's important that his public statements be truthful
17 and accurate, is it not?

18 A. Yes.

19 Q. His public statements can move the market price of
20 Barclays stock, can they not?

21 A. I guess.

22 Q. Now, sir, in what respect is this statement not accurate?

23 A. Again, if I may, the date's important because I don't know
24 if it's not accurate as to the point in time at which he
25 referred to this in the market.

1 Q. What I'd like you to do is to focus your attention on
2 Friday September 19, 2008, and specifically, to your
3 understanding at that time, can you tell me in what respect
4 this does not accurately describe the transaction as of Friday,
5 September 19, 2008?

6 A. It doesn't have the buildings in it, for one.

7 Q. It doesn't have what?

8 A. The buildings in it. And I'm not sure what he means by
9 net assets either. I didn't understand that. I think he's
10 talking about -- again, I think he's talking about the assets
11 although I believe this was the estimate of what we were
12 talking about that the good will was at the time.

13 Q. Leaving aside the buildings, sir ,let's just focus on the
14 net assets. If we understand that to be the day one gain, the
15 disparity between the assets and the liabilities, with that
16 understanding, is Mr. Varley's statement accurate? Again,
17 leaving aside the buildings.

18 A. I'm trying to think back to September 19th because I don't
19 think we had finalized values. Ultimately we recorded a day
20 one gain of about two and a half billion pounds.

21 Q. It was approximately four billion dollars, correct?

22 A. Yes.

23 Q. So again, leaving aside the buildings, with respect to
24 your understanding as of Friday, September 19, 2008, is this
25 consistent with your understanding of this transaction as of

1 that date?

2 A. As I would interpret this, it's close.

3 Q. Well, when you say it's close, in what respect do you --

4 A. Well, we didn't have any values finalized on that day

5 so --

6 Q. Well, let me not hold you to the four billion dollars.

7 Let's say --

8 A. Okay.

9 Q. -- some number of billions of dollars. We can work on the
10 decimal points or the precise hundreds of millions either way.

11 A. Fine.

12 Q. But leaving that aside, is it fair to say that, broadly
13 speaking, this statement by Mr. Varley here is an accurate
14 statement and consistent with your understanding on Friday,
15 September 19, 2008?

16 A. Yes.

17 Q. Certainly you understood that Barclays was acquiring the
18 balance sheet, isn't that right?

19 A. We were acquiring certain assets.

20 Q. You see Mr. Varley refers to the balance sheet that we
21 have acquired. Is it your testimony that that was not an
22 accurate statement?

23 A. I don't know what he means by a balance sheet.

24 Q. And certainly there was a disparity between the assets,
25 between what Barclays was paying and what Barclays was getting,

1 whether or not that was four billion dollars or estimated at
2 Friday the 19th to be some slightly smaller or larger number we
3 can leave for another day. But certainly there was that
4 disparity, was there not?

5 A. Assets exceeded liabilities.

6 Q. And it was by some billions of dollars, was it not?

7 A. Again, didn't have values on that day but I would
8 acknowledge, yes, it's exceeded liabilities.

9 Q. And you understood that on Friday, September 19th?

10 A. Yes.

11 Q. In fact, you had done everything humanly possible to make
12 sure that there was that disparity and that it was achieved in
13 your negotiations with Lehman, isn't that right?

14 A. Yes.

15 Q. You did that job to the best of your ability.

16 A. Did my best to make sure that we met the goals of the
17 board which was to be capital accretive.

18 Q. And to be as capital accretive as possible.

19 A. I wouldn't say as possible.

20 Q. Didn't you want to get as big a day one gain? Didn't you
21 want this transaction to be as good for Barclays as it could
22 possibly be? Wasn't that your job?

23 A. My job was to make sure that we didn't put Barclays in
24 harm's way, so it was about preserving capital. Certainly we
25 wanted to be accretive. But I never said we wanted it to be as

1 big as it possibly could be.

2 Q. You were certainly here representing the best interests of
3 Barclays' shareholders, isn't that right?

4 A. Yes.

5 Q. And responsible to Mr. Diamond and to the board?

6 A. Correct.

7 Q. Your job is to make as big a profit for Barclays in the
8 course of its business as management is capable of doing, isn't
9 that correct?

10 A. In the normal course of business, yes, you want to
11 maximize returns to shareholders.

12 Q. Now, sir, did you understand that this disparity between
13 what Barclays was paying and what Barclays was getting was
14 going to be an issue that would be considered before this
15 Court?

16 A. What do you mean by "issue"? Sorry.

17 Q. That the disparity between what Barclays was paying and
18 what Barclays was getting would be presented for consideration
19 by the Court.

20 A. Again, I don't know specifically what was going to be --
21 if that was an issue for the Court. Remember, I've got those
22 attorneys, everyone doing that. I don't know if it was
23 relevant or not to the Court -- relying on my attorneys to do
24 that. Certainly we were very public about what the expected
25 gain was going to be on the previous Wednesday.

1 Q. You understood, did you not, sir, that the whole point of
2 the hearing here was to determine whether or not the
3 transaction would be approved?

4 A. Yes.

5 Q. And you understood that a central consideration in that is
6 whether the transaction was fair?

7 A. Fair to whom?

8 Q. Fair to the estate of Lehman.

9 A. Yes.

10 Q. You understood that?

11 A. Yes.

12 Q. And that obviously involved an inquiry into the economics
13 of the transaction, did it not?

14 A. I wouldn't speak for the Court as to what is relevant and
15 not relevant. I'm not an attorney. Again, I relied on my
16 attorneys and advisors to present what the Court needed to
17 approve the agreement and the sale. And certainly, from my
18 perspective, you know, I was worried about Barclays' interests
19 and making sure that, you know -- and the Lehman people and all
20 those type of activities. So I was relying on others to
21 represent to the Court what the Court needed to understand.

22 Q. I will not ask you, sir -- I will not presume to ask you
23 to speak for the Court. I ask you to speak only for you. You
24 understood that the economics of this transaction would be
25 presented to the Court?

1 A. Relevant economic information, yes.

2 Q. And you understood that a critical piece of relevant
3 economic information was the disparity between what Barclays
4 was paying and what Barclays was getting? Did you not?

5 A. I don't know if that was relevant for the Court or not,
6 sir, I'm sorry.

7 Q. It was relevant to you in assessing the fairness of this
8 transaction to Barclays, was it not?

9 A. Yes.

10 Q. It was relevant to Mr. Diamond, was it not?

11 A. Yes.

12 Q. It was relevant to Mr. Varley, was it not?

13 A. Yes.

14 Q. And it was certainly relevant to your board, was it not?

15 A. Yes.

16 Q. Now, sir, you gave some testimony earlier about the
17 scramble for assets on that Friday the 19th, the assets that
18 Barclays demanded. I'd like to start by asking you about one
19 of those assets in particular and that's the 15c3 assets.

20 A. Okay, yes?

21 Q. I understand it's your position that Barclays was going to
22 get these assets absolutely and unconditionally, is that
23 correct?

24 A. Yes.

25 Q. No one told you that there as any problem or any condition

1 or sensitivity in Barclays getting any of these 15c3 assets?

2 A. Not that I recall.

3 Q. And it's your position that if for any reason Barclays
4 could not get assets from inside the account, then certainly
5 Barclays would be absolutely entitled to an equivalent amount
6 of securities from outside the account. That is your position?

7 A. My understanding was that if we didn't get the assets, we
8 would get the equivalent value from the estate, yes.

9 Q. Now, of course, you'd heard from Mr. Kirk who told us just
10 a little while ago that there was nothing left. Nothing left
11 to give to Barclays, isn't that right?

12 A. At that stage, he said there was nothing; that they
13 couldn't find anything else.

14 Q. He told you that's all there is. All that we can find,
15 isn't that right?

16 A. At that point, yes.

17 Q. So if you couldn't get the assets from inside the account
18 and the estate had to look for assets outside the account and
19 there was nothing left, then that would put the estate either
20 in default or it would have to resort to getting customer
21 property to pay Barclays this value, isn't that right, sir?

22 A. No, no necessarily. I don't know whether -- if the estate
23 is finally going to settle or where it was going to settle.
24 There was a lot of confusion and uncertainty around what values
25 were and there could have been additional values somewhere else

1 in the estate.

2 Q. All kinds of things are possible, sir. I'm asking you to
3 focus your attention on this. It's not possible to get the
4 securities from the account and there's nothing left outside
5 the account. Then that leaves the estate with only two places
6 to go; either default or giving you customer property. Isn't
7 that correct?

8 A. Well, not necessarily, because Mr. -- I -- Mr. Kirk wasn't
9 speaking for the estate he was speaking -- this is all we could
10 find, you know, I can't find anything else. Their accounts
11 were in complete disarray. Theoretically, you may be right.
12 Theoretically, maybe they could have found additional assets.
13 At the time the conversation was, brief conversation, "We're
14 exhausted. That's it. We can't find anything else. Are we
15 done?"

16 Q. But other than the aspiration that somebody might find 769
17 million dollars somewhere, other than that aspiration, there
18 was nowhere for the estate to go other than default or customer
19 property. Isn't that correct?

20 A. I don't know if that's true or not. Mr. Kirk wasn't
21 speaking for the estate; he was speaking for himself.

22 Q. Is it your testimony, sir, that Lehman agreed to deliver
23 to Barclays 769 million dollars, even if there was nothing left
24 and even if there as a shortfall in customer property?

25 A. My understanding was is that we would get 769 million

1 dollars from the estate.

2 Q. Sir, let me show you, please, some testimony of Lehman's
3 president, Bart McDade. If we can show you page 599 of his
4 trial testimony. And that is starting at line 9: "Q. Can you
5 please tell the Court whether that deal, what was described to
6 the SEC just hours before the closing, whether that ever
7 changed and specifically whether Lehman ever agreed
8 unconditionally to give Barclays any assets from the 15c3
9 account?" "A. To the best of my knowledge, the deal did not
10 change and certainly Lehman was in no position, either with
11 other assets or touching a segregated client asset that
12 obviously needed regulatory approval for anything that we did
13 with respect as any consideration in the transaction."

14 You see that testimony, sir?

15 A. Yes, sir.

16 Q. You'll agree with me that Mr. McDade had an understanding
17 that is the exact opposite of yours?

18 A. That's what he says, yes.

19 Q. Now let me, sir, please refer you to the trial testimony
20 of Lehman's lawyer, Harvey Miller, at page 998 of the trial
21 transcript. And starting at line 5:

22 "Q. Did you at any time enter into any commitment on behalf of
23 Lehman that Barclays would get the 769 billion (sic) dollars
24 unconditionally?

25 "A. I assume when you say me, you are talking about Lehman.

1 "Q. I am referring to you personally or anyone that you know
2 acting on behalf of Lehman.

3 "A. Absolutely no commitment.

4 "Q. Did you or anyone that you know acting on behalf of Lehman
5 undertake or give Michael Klein or anyone at Barclays a
6 commitment that if there was a regulatory problem and the 769
7 million dollars in securities could not be transferred from
8 inside the 15c3 account, Lehman would be required to substitute
9 and provide 769 million dollars from somewhere outside that
10 account?

11 "A. Absolutely not."

12 Sir, you'll agree that Mr. Harvey Miller's testimony
13 reflects an understanding that is also the exact opposite of
14 yours?

15 A. Yes. I neither spoke to Mr. McDade or Mr. Miller about
16 this.

17 Q. Did Mr. Michael Klein tell you that he had been admonished
18 by Harvey Miller that the chances of Barclays getting the 769
19 million were slim to none?

20 A. I don't recall.

21 Q. You don't recall that, sir?

22 A. I don't recall.

23 Q. Is it your position, sir, that you were never told that
24 this asset was conditional, that there was a contingency, a
25 sensitivity around it?

1 A. I don't recall. I do recall that we were specific that if
2 there was an issue, we would expect to get the 769 from
3 somewhere else in the estate. But I don't remember -- I'm not
4 saying it didn't happen, I don't recall it happening. That
5 there was a specific conversation, but I do remember saying or
6 agreeing to certain language around if we couldn't get it
7 there, we'd get it from the estate.

8 Q. Sir, I'd like you please to refer to tab 3 of your binder.
9 And that is Movants' Trial Exhibit 436. Your colleague, Mr.
10 Patrick Clackson visited with us some days ago and we discussed
11 this with him. This is a paper for the board audit committee
12 meeting of Barclays on 21 October, 2008. Do you see that, sir?

13 A. Yes.

14 Q. I'd ask you, sir, please, to turn to the last page of the
15 exhibit and to look at the provisional acquisition balance
16 sheet and negative good will calculations. Do you see that,
17 sir?

18 A. Yes.

19 Q. Now if you look at the financial assets column and just go
20 down three lines, you'll see a cash deposit, and it's in the
21 amount of 770 million dollars. Do you see that, sir?

22 A. Yes.

23 Q. Now please, sir, look at note 2. You'll see there, there
24 is a sensitivity that is reported to the Barclays audit
25 committee and you see that that reports the release of this

1 deposit is subject to SEC approval. Do you see that, sir?

2 A. Yes.

3 Q. Were you aware of this report before it was provided to
4 the audit committee?

5 A. I don't recall specifically.

6 Q. Did you tell Bob Diamond that this asset, the 770 million
7 dollars from Lehman, was conditional?

8 A. I don't recall if I had a specific conversation with Bob
9 that it was conditional but, again, I do remember explaining
10 that we had language that said if we couldn't get it through
11 the -- if for some reason we couldn't get it from whoever, we'd
12 get it from the estate. So, by its nature, it was, I'd say,
13 not conditional -- I don't remember a specific conversation on
14 conditional or anything. But clearly we were trying to say if
15 we couldn't get it, then we'd get it from the estate. So
16 clearly there was some issue, or potential issue.

17 Q. Is it fair to say that Mr. Diamond does not like
18 surprises?

19 A. You'd have to ask Mr. Diamond. That is a characterization
20 of Mr. Diamond. That's public.

21 Q. This 770 million dollars has been recognized as earnings
22 by Barclays, has it not?

23 A. I don't know if it's been recognized as earnings,
24 actually.

25 Q. Prior to the release of Barclays' accounts for 2008, did

1 you ever tell Mr. Diamond that this 770 million dollars was
2 subject to a contingency?

3 A. We may have had the conversation again because of the
4 nature of the language around -- if we didn't get it from -- if
5 we couldn't get it, we'd get it via the estate from another
6 way. So, I don't remember if we had the specific term around
7 contingency, but clearly there was an issue because I was
8 saying if we didn't get it one way, we'd get it another.

9 Q. You advised Mr. Diamond of the issue, did you, sir?

10 A. I can't recall. I really can't recall.

11 Q. Sir, let me --

12 THE COURT: Mr. Maguire --

13 A. Well, the language is there --

14 THE COURT: Mr. Maguire, let me just break in in terms
15 of scheduling. Mr. Maguire, can you give me an estimate as to
16 how much longer you're going to be? Because if it's going to
17 be brief, we can take the time and not take a break. If you're
18 going to be a while, we'll change reporters.

19 MR. MAGUIRE: It'll be a little while, Your Honor.

20 THE COURT: I think we'll take a break then. Five
21 minutes.

22 (Recess from 4:40 p.m. until 4:51 p.m.)

23 THE COURT: Be seated, please.

24 MR. MAGUIRE: If it please the Court.

25 RESUME CROSS-EXAMINATION

1 BY MR. MAGUIRE:

2 Q. Sir, I'd like to ask you some questions about the 1.9
3 billion dollar asset that you got on the Friday the 19th.
4 That's the assets at DTC or the depository trust company.
5 Right away, you understood there was an issue with the value of
6 those assets, isn't that right?

7 A. I don't know that there was issue with the value of those
8 assets. I remember, I recall that they were descr --
9 unencumbered assets. The 1.9 billion.

10 Q. You remember that the Lehman people referred to these
11 assets as the bag of hammers?

12 A. No.

13 Q. You remember that Michael Keegan and Stephen King were
14 involved in looking at these assets?

15 A. I don't recall whether they would have or not. I do not,
16 sorry.

17 Q. Do you recall Mike Keegan telling you on Friday the 19th
18 that these were the most illiquid securities that Lehman had?

19 A. I don't recall that.

20 Q. Do you recall Mr. Keegan telling you that Friday that he
21 didn't know he was going to put a positive value on those
22 assets?

23 A. I don't recall that specifically, either. Mr. Keegan
24 certainly had big concerns about the entire transaction.

25 Q. Do you deny that Michael Keegan on Friday, September 19,

1 2008 told you that he would be very nervous about putting a
2 positive value on these assets?

3 A. I don't recall that.

4 Q. Through the weekend, Stephen King valued these assets at
5 nil, isn't that right, sir?

6 A. I don't recall specifically.

7 Q. Well, you received an e-mail, did you not, from Patrick
8 Clackson shortly after the weekend telling you that Stephen had
9 valued these assets at nil?

10 A. I may have. I don't recall.

11 Q. Would you turn, sir, please, to tab 5 of your binder?

12 A. Yes.

13 Q. If you look at the top of the exhibit, sir, you'll see
14 that that is an e-mail that your colleague Patrick Clackson
15 sent you on Tuesday, September 23, 2008 in which he said in the
16 first line of the e-mail, "1.9 billion was in but Stephen has
17 valued at nil. So maybe upside." Do you see that, sir?

18 A. Yes, I do see that. I -- it refreshes my recollection.

19 Q. So you understand that through the weekend, your colleague
20 Stephen King was valuing these assets at DTC at nil?

21 A. Well, there was valuations that -- across a variety of
22 numbers. I mean, this was -- you could see from Patrick's
23 note, he said there may be upside. Again, the asset's very,
24 very difficult to value throughout the whole weekend,
25 throughout the previous week and then into the following weeks.

1 Q. There's always a possibility of upside. My question, sir,
2 is that you understand that Stephen King valued this through
3 the weekend at nil?

4 A. I don't know if it was through the weekend, but certainly
5 at that point it was, yes.

6 Q. Now sir, you understood that DTC had serious concerns
7 about its exposure to Lehman?

8 A. Yes.

9 Q. Many, many billions of dollars of unsettled Lehman trades
10 were outstanding, were they not?

11 A. It was a significant number, yes.

12 Q. And the DTCC wanted an unlimited guaranty from Barclays,
13 did it not?

14 A. Yes, it did.

15 Q. And Barclays, given the markets, had no appetite for
16 giving any unlimited guarantee, isn't that correct?

17 A. We had a lot of conversations around it and as I recall,
18 we bounced back and forth as to what we wanted to do. But we
19 eventually ended up saying no, we'd give no unlimited
20 guarantee.

21 Q. Barclays had no appetite to give an unlimited guarantee,
22 isn't that correct?

23 A. Yes.

24 Q. Of course, the issue with DTC was that if DTC issued a
25 cease to act notice for Lehman, then all trading would stop,

1 all unsettled trades could be open and there would be no
2 business to buy. You understood that, did you not?

3 A. That -- there were certain -- I don't understand all the
4 intricacies you describe, but, yes, certainly getting the DTC
5 comfortable was important to getting it open for business, yes.

6 Q. You certainly understood that the issue with DTC
7 threatened your ability to close this entire transaction?

8 A. Yes.

9 Q. If you would turn, sir, to tab 4 of your binder? This is
10 an e-mail that -- Movants' Trial Exhibit 522, that Archie Cox
11 sent to Bob Diamond concerning the closing. You see that, sir?

12 A. Yes.

13 Q. And just below that, you'll see there's an exchange of e-
14 mails in which you were involved, right?

15 A. Yes.

16 Q. And starting at the bottom, you'll see there's an e-mail
17 from Archie Cox to Bob Diamond in which he notifies him, "You
18 should be aware" -- and the subject here is "Closing" -- "that
19 there are issues around clearing which could be significant and
20 thus affect closing. The issues are being addresses but a
21 resolution is not yet clear." Do you see that, sir?

22 A. Yes.

23 Q. And then there was a response from Mr. Diamond in which he
24 said, "This is Rich's responsibility." And you were copied on
25 that, were you not, sir?

1 A. Yes.

2 Q. "Please be sure to get his approval on everything. I know
3 you know this, but too much slipping through cracks, as you
4 say." You see that, sir?

5 A. Yes.

6 Q. You understood at this time that there were issues, very
7 serious issues, concerning DTC which affected the closing?

8 A. The potential closing, yes.

9 Q. And you knew that this was your responsibility?

10 A. Yes.

11 Q. And Barclays wanted to close this deal, did it not?

12 A. Yes.

13 Q. You certainly did not want to lose this deal over any
14 problem with DTCC, isn't that correct?

15 A. If we could avoid it, absolutely correct, yes.

16 Q. And on this Sunday, Mr. Diamond made very clear that this
17 deal was your responsibility? Isn't that right?

18 A. He made it very clear this responsibility Archie was
19 saying, was mine, yes.

20 Q. Now the person that you put in charge of dealing with DTCC
21 was Gerard LaRocca, correct?

22 A. That's correct.

23 Q. And Mr. LaRocca is a senior executive of Barclays,
24 correct?

25 A. Yes.

1 Q. He was also on the board of DTCC, correct?

2 A. That's correct.

3 Q. And Mr. LaRocca had authority working with your team and
4 your counsel to enter into whatever agreements he had to to get
5 this deal done, isn't that correct, sir?

6 A. Not whatever agreement he had to to get this done, because
7 as you said, we certainly weren't prepared to, you know,
8 guarantee all the clearing on an unlimited basis.

9 Q. Sir, if I could trouble you to turn to your deposition
10 transcript, which may be in that large binder that you have.

11 A. Yes.

12 Q. And turn, please, to page 238, starting at line 23:

13 "Q. Did Mr. LaRocca have authority to say that substantial
14 assets or any assets for that matter could be excluded from the
15 sale?

16 "A. Mr. LaRocca would have been working with our counsel and
17 our deal team on the specific nature of those trades and what
18 might be included or excluded.

19 "Q. And to the extent that he was working with counsel in good
20 faith and doing his best to get the best job for Barclays, he
21 had the authority to enter into whatever agreements that he had
22 to enter into, is that correct?

23 "A. Yes, broadly."

24 You were asked that question, sir, and you gave those
25 answers, did you not?

1 A. Yes.

2 Q. And that testimony was true at the time you gave it --

3 A. Yes.

4 Q. -- was it not?

5 A. Yes.

6 Q. And that testimony remains true today does it not, sir?

7 A. Yes.

8 Q. Now, sir, I'd like to ask you some questions about
9 Lehman's margin. By margin I mean the cash, cash equivalents
10 and government securities that Lehman's posted as collateral
11 with clearing organization. You understand?

12 A. Yes.

13 Q. This is a subject on which you were designated by Barclays
14 to be its corporate representative, specifically with respect
15 to the subject of disclosure. Do you recall that, sir?

16 A. Yes.

17 Q. In fact at tab 2 of your binder, sir, you will see
18 Movants' Trial Exhibit 454 and that is the notice in which the
19 movants -- I'm sorry -- the debtors notified Barclays of the
20 topics. And specifically, if you turn to the third page of
21 that exhibit, you will see that the subject number 3 is the
22 timing and extent of disclosures to the bankruptcy court, the
23 SIPA trustee, Lehman Brothers Holdings, Inc. and all other
24 parties in interest regarding the actual or proposed transfer
25 to Barclays of any exchange-traded derivatives and any exchange

1 deposit to which Barclays claims entitlement under the
2 clarification letter, the TAA or otherwise. You see that, sir?

3 A. Yes.

4 Q. And that notice was sent to Barclays on or about August 12
5 of 2009. And in case you don't recall, I'll represent to you
6 that your deposition was on September 15, just over a month
7 later. You recall that you were designated as Barclays'
8 corporate representative on the subject of disclosure?

9 A. Yes, sir.

10 Q. And in satisfying Barclays' obligations in discovery, you
11 prepared for that deposition with other people at Barclays,
12 including Barclays' counsel, isn't that correct, sir?

13 A. Yes, sir.

14 Q. Now, I understand, sir, your position is that Barclays
15 made three disclosures that it acquired Lehman's cash, cash
16 equivalents and government securities, is that correct? And if
17 it helps you, I'll list them.

18 A. Please.

19 Q. The asset purchase agreement, the clarification letter,
20 and Barclays' accounts. Those are the three disclosures that
21 you gave at that deposition, correct?

22 A. Yes.

23 Q. And starting last, the accounts that you refer to, those
24 are Barclays' 2008 accounts which it published in the first
25 part of 2009, correct?

1 A. That's correct.

2 Q. And the clarification letter, the clarification letter is
3 the letter that was created over the weekend following the sale
4 here in this court, isn't that correct?

5 A. That's correct, sir.

6 Q. And you're not aware of any other disclosure other than
7 the accounts, the clarification letter and the asset purchase
8 agreement, isn't that correct, sir?

9 A. I -- that's correct, sir, yes.

10 Q. And you say that not only personally, but as Barclays'
11 corporate representative, correct?

12 A. Correct.

13 Q. Now, sir, I'd like to turn your attention to the asset
14 purchase agreement and specifically to the disclosure to
15 Barclays' acquisition of Lehman's cash, cash equivalents and
16 government securities. And I believe that is Exhibit 1 and it
17 should be in the large binder that you have before you.

18 THE COURT: It's also in the small binder that you
19 gave the witness.

20 MR. MAGUIRE: I appreciate that, Your Honor.

21 Q. So you have the small one --

22 A. Thank you. It's easier to deal with.

23 Q. -- right there. And if you turn, sir, to page 6 --

24 A. Yes.

25 Q. If you look about six to seven lines up from the bottom,

1 you'll see a subsection (d) under "Purchased Assets".

2 A. Yes.

3 Q. And right in the middle of that you'll see the words,
4 "Exchange-traded Derivatives". Do you see that, sir?

5 A. Yes.

6 Q. And that is the disclosure that you identified that
7 Barclays had made, disclosing that it was acquiring Lehman's
8 cash, cash equivalents and government securities. Isn't that
9 correct?

10 A. Yes.

11 Q. And there is no other disclosure that Barclays made in the
12 asset purchase agreement other than those three words, isn't
13 that correct?

14 A. I believe that's correct, yes.

15 Q. Now, sir, you understand, do you not, the difference
16 between exchange-traded derivatives and the cash, cash
17 equivalents or government securities that are used as
18 collateral to support exchange-traded derivatives?

19 A. Yes, is that it -- yes.

20 Q. Can you explain that difference for us?

21 A. Well, the collateral is posted and is associated with
22 those positions, the exchange-traded derivatives. And when
23 we --

24 Q. Sorry.

25 A. Yep.

1 Q. And if I understand your position, sir, it's your
2 understand that these three words constitute a disclosure that
3 Barclays was acquiring Lehman's cash, cash equivalents and
4 government securities used as collateral because it's your
5 understanding that if Barclays took the derivatives without the
6 collateral, it would have to post its own cash?

7 A. Correct.

8 Q. And you have no other basis for saying that this is such a
9 disclosure other than that understanding?

10 A. Well, certainly there -- we didn't know what was in the
11 accounts at the time. No one would ever take the derivatives
12 without taking the collateral.

13 Q. You --

14 A. Sorry. No. I don't mean no one. As a business, we
15 wouldn't take the positions without taking the collateral.

16 Q. And that is the only basis for your understanding, sir?

17 A. Yes.

18 Q. Now, sir, I'd like to show you the testimony at trial of
19 Mr. Bart McDade at page 602 of the trial transcript. And this
20 is starting at line 21: "Sir, I would like to ask you a few
21 questions about Lehman's margin assets. And by margin assets
22 what I am referring to is Lehman's cash, cash equivalents and
23 government securities that it posted as collateral at clearing
24 firms."

25 And going over to the next page:

1 "A. Okay.

2 "Q. Can you please tell the Court whether Lehman's margin
3 assets were included in this sale?

4 "A. They were not intended to be included in the transaction."

5 The next question: "Did you ever authorize any agreement
6 with anyone at Barclays to include any Lehman cash margin in
7 the sale?"

8 "A. No, I did not."

9 You see that testimony, sir?

10 A. I do.

11 Q. You would agree with me that Mr. Bart McDade's
12 understanding is exactly the opposite of yours?

13 A. Certainly not the same as mine.

14 Q. And you would agree with me that Mr. McDade -- back to your
15 knowledge, Mr. McDade is a person who spent his entire
16 professional life in investment banking?

17 A. I don't know Mr. McDade's background, except he was in
18 investment banking for a long time, yes.

19 Q. At the time you dealt with him, he was the president of
20 Lehman?

21 A. Yes.

22 Q. And certainly, sir, you have never discussed the
23 understanding that you've testified about, that margin is
24 necessarily goes along -- let me take that back. The
25 understanding that you said that no one would acquire exchange-

1 traded derivatives without the collateral and that Barclays
2 would not do so. You have never discussed that understanding
3 with anyone other than your counsel. Isn't that correct?

4 A. That is correct. I recall, Mr. Maguire, that this -- as I
5 recall, the issue exchange-traded derivatives was settled early
6 in the week and there was no cause to have a further dialog
7 about it. It never came up.

8 Q. You certainly never discussed including margin in the sale
9 with anyone at Lehman?

10 A. I didn't personally, no.

11 Q. And when you say personally, in your corporate capacity as
12 a representative of Barclays, you are not aware of anyone at
13 Barclays who discussed margin being included in the sale to
14 Barclays, isn't that correct?

15 A. I can only speak personally. I don't know if we had
16 people handling that in the team, but I'm not familiar with any
17 conversations they had.

18 Q. So if you had any thoughts along the lines that the
19 understanding that you've testified about, you kept them to
20 yourself?

21 A. I discussed them with counsel, I think, at one point, but
22 we all assumed it was coming. It was, again, it was settled
23 earlier in the week in our minds and it never came back up.

24 Q. And it was settled, you say, because those three words
25 that were in the asset purchase agreement? Is that your

1 **testimony, sir?**

2 **A. Those three words were disclosure, yes.**

3 **Q. Very good. Thank you, sir.**

4 MR. MAGUIRE: I have no further questions.

5 THE WITNESS: Thank you.

6 THE COURT: Anything from the committee?

7 MR. KIRPALANI: No, Your Honor.

8 THE COURT: Mr. Schiller, it's time for cross-
9 examination. And without limiting what you choose to do, I
10 would just express the preference, if it's possible, to make
11 this efficient an examination as possible, that we try to
12 conclude by 7 p.m. if we can. If that's not possible, we'll
13 stay later. But at some point, there is a point of diminishing
14 returns, especially as it relates to my ability to get your
15 point or not be irritated that you still keep making your
16 points.

17 MR. SCHILLER: Thank you, Judge. Well, I know you
18 said at the beginning f this trial, you expected to hear some
19 things over and over again and expected to see some of the same
20 documents over and over again. I will not take that much time
21 tonight.

22 CROSS-EXAMINATION

23 BY MR. SCHILLER:

24 **Q. Mr. Ricci, I appreciate your patience. As the Court's**
25 **indicated, he wants your examination finished and you well on**

1 your way home tonight.

2 A. Thank you very much.

3 Q. You were asked in your direct examination about the APA
4 and specifically the first lawyer who examined you made
5 reference in the APA to the "book value" of approximately
6 seventy billion of long positions. Do you recall that part of
7 the earlier examination?

8 A. Yes.

9 Q. All references in the APA to book value were removed by
10 the clarification letter later that week, isn't that true?

11 A. That's correct.

12 Q. In fact, all references to the value or the estimated
13 value of assets and liabilities was removed by the
14 clarification letter, correct?

15 A. That's correct.

16 Q. And was that in part because by the time of the
17 clarification letter, no one believed that book value was
18 relevant or at least you didn't believe that?

19 A. As I said earlier, the market was so difficult and it was
20 such trouble valuing assets, book values were irrelevant.

21 Q. Is it also in part -- was it also in part an issue of what
22 assets were actually there and an effort to determine that
23 following the repo?

24 A. Yes, because the assets referred to in the APA and the
25 short positions for that matter by the end of the week were

1 gone and essentially replaced by the repo.

2 Q. Thank you. You were shown a page of Mr. Diamond's
3 deposition. Do you recall that? I think it was page 66, lines
4 13 through 19, but you weren't given a copy. And while you
5 were looking at those lines, 13 through 19, that question and
6 that answer, as to capital accretion and Mr. Diamond's answer,
7 "I have explained that many times" -- let -- you answered only
8 as to that particular page. Let me address your attention to
9 page 60 of Mr. Diamond's deposition and you see at lines 7,
10 beginning at line 7 in his answer at page 60 he states, "So
11 doing a transaction that was accretive to capital was very,
12 very important to our board and was a strong instruction to me.
13 Notwithstanding that, it was very difficult to value the group
14 of assets and the group of liabilities that we agreed on. And
15 more than telling you that we agreed on a group of assets or
16 discussed a group of assets and a group of liabilities, any --
17 that is how -- that is how we managed this. With clarity
18 around the fact that, again, with all the risks, nothing could
19 be guaranteed, being capital accretive was important."

20 Do you see that?

21 A. Yes.

22 Q. And do you agree with that?

23 A. Yes.

24 Q. Let me also show you page 63, which you did not see in
25 your earlier examination. And let me address your attention

1 there to lines 2 through 9, Mr. Ricci. And Mr. Diamond says
2 again here, "There was a group of assets and a group of
3 liabilities and there was the condition that notwithstanding
4 the risk in the markets and the difficult valuation sin the
5 markets, that at the end of this, we had a commitment to do the
6 best of our ability. Again, nothing could be guaranteed that
7 it would be capital accretive."

8 Do you agree with Mr. Diamond's testimony there?

9 A. Yes. As I said, there were parameters that were set by
10 the board and that was our intent. But yes, there's nothing
11 guaranteed given the environment.

12 Q. And let me finally turn your attention to page 89 of Mr.
13 Diamond's deposition, which you also didn't see. Let me begin
14 actually on page 88 at line 9. Mr. Diamond testifies there, "I
15 think clearly the mismatch is what creates the capital
16 accretion, and you know, listen, fair enough, I've said it
17 before in other situations and I'll try to say it again. It's
18 not that there as certainty in valuations. Not that there was
19 certainty in the information. And it is clear that the
20 volatility of the market, even if there was certainty in
21 valuation that day and certainty in information, of which there
22 was neither, when the equity market is swinging around 500
23 points a day, you can imagine the volatility. So this was a
24 very stressful situation for me, as a main board member to be
25 able to say to my board that you have the highest certainty

1 possible of capital accretion as we are showing it to you,
2 notwithstanding the uncertainty, the lack of valuations, the
3 lack of information and the volatility in the market. And I
4 was. To be fair, we could only do the best we could. There
5 were no guarantees."

6 Do you agree with Mr. Diamond's testimony?

7 A. Yes. It's consistent with the parameters I described that
8 the board laid out.

9 Q. A portion of Bart McDade's testimony here before His Honor
10 at trial was also put up on the screen. Let me put another
11 page up on the screen for you. Beginning at page 97, there's a
12 question at the very bottom that continues to the next page,
13 98. And the question to Mr. McDade at trial from Mr. Boies
14 was, "And there were a number of assets that might be of little
15 or no value to Lehman as a nonoperating company that might have
16 substantial value to Barclays as an operating company?" McDade
17 answers, "Yes. I would agree." And Mr. Boies asks him, "And
18 if that difference resulted in a first day gain for Barclays,
19 that was in no way inconsistent with your understanding of the
20 deal, correct?" And Mr. McDade answers, "Correct."

21 Do you agree with Mr. McDade's testimony?

22 A. Yes, I do.

23 Q. Was one way for Barclays to have an economic gain from
24 this transaction to acquire assets that had value to Barclays
25 but that were not valued by Lehman during the negotiation

1 process?

2 A. Certainly. The most simple example of that would be --
3 software is probably the simplest example. Operating
4 platforms. There's others, obviously.

5 Q. And those are of value to Barclays as a going concern, but
6 not of value to Lehman?

7 A. That's correct.

8 Q. I don't know whether you were here while Mr. Burian was
9 still testifying, but he said toward the end, and so you may
10 have been here, that it was a given, and I quote him, that
11 Barclays would have an "economic gain" from the entire
12 transaction. DO you agree with that testimony?

13 A. Again, you couldn't guarantee anything. But it certainly
14 was our stated intent and open intent to have a gain.

15 Q. You were asked about Ms. Leventhal's testimony before His
16 Honor and a declaration that Ms. Leventhal submitted to His
17 Honor in December of 2008. DO you recall that?

18 A. Yes, I do.

19 Q. And that was a declaration having to do with the
20 settlement of JPMorgan and I'm not going to go into that with
21 you today.

22 A. Right.

23 Q. But you were asked about the marks on the federal repo
24 collateral as of Wednesday, September 17th but counsel. Do you
25 remember that?

1 A. I do.

2 Q. You may have said this earlier but I'd like you to be
3 clearer with His Honor if you did not. Did Barclays ever
4 receive all of the collateral in the fed repo that Ms.
5 Leventhal referenced in her declaration?

6 A. No, we didn't. That was the whole issue on Thursday, the
7 nondelivery of the assets that were worked out were supposed to
8 come were significant.

9 Q. And did the value of what did come decline after Thursday,
10 September 17th?

11 A. To the best of my recollection, it did, yes.

12 Q. And did what was actually delivered to Barclays include
13 illiquid securities that were very hard for you and your team
14 to value?

15 A. Yes.

16 Q. You were asked some questions about Mr. Clackson's e-mails
17 concerning cure and comp. Do you recall that?

18 A. Yes, I do.

19 Q. And Mr. Clackson has testified before His Honor about his
20 accounting. And I know you are not an expert in accounting,
21 but I just want to touch on that subject with regard to
22 documents you were shown concerning a 650 million dollar
23 portion of the two billion dollar value of the -- billion
24 dollars of the comp obligation. Remember that discussion?

25 A. Yes.

1 Q. Do you recall whether Mr. Clackson, with regard to that
2 portion of the comp, was considering whether that should move
3 from the acquisition balance sheet and be expensed on the
4 profit and loss statement early in the week?

5 A. Early in the week, we had various conversations about both
6 the treatment, accounting treatment of the comp accrual as well
7 as the cure accrual and there was some discussion about
8 whether, you know, we would trade in P&L for accounting
9 purposes or balance sheet, it would have made a difference to
10 the opening gain and there were some issues around the
11 technical treatment of that, and what was appropriate.

12 Q. And did the comp include bonus and severance?

13 A. Comp included bonus and severance.

14 Q. So was there a question whether what you were going to
15 spend, depending on how many people remained here and how many
16 people parted ways with Barclays after their initial
17 employment, that spend would move over to profit and loss and
18 not be accounted for on Mr. Clackson's acquisition balance
19 sheet?

20 A. That was one of the topics we were debating, yes.

21 Q. And was that the concern about the 700 -- 650 million that
22 is, where it would be accounted for?

23 A. Mr. Clackson, in that e-mail, I know he was worried about
24 the technical accounting because Gary Romain I think was in the
25 previous e-mail, if I recall correctly, he was our technical

1 accountant.

2 Q. And the 2.25 billion for cure, you told His Honor that you
3 were aware of that number early in the week and through the
4 week, right?

5 A. That's correct.

6 Q. DO you remember early in the week whether Mr. Clackson
7 intended to move that 2.25 off of the acquisition -- draft
8 acquisition balance sheet over to P&L to incur those charges as
9 they were spent, as the cure money was spent?

10 A. As I said, that was another accounting treatment we
11 considered. So, yes, Mr. Clackson did discuss that type of
12 treatment for that -- for the sure, yes.

13 Q. Do you know how long it took to determine what your cure
14 payments ultimately were?

15 A. I don't recall. We started the work, obviously, as soon
16 as we could and I think we ended up going through to about
17 November time frame to determine the final amount.

18 Q. You were also asked about representations and the repo.
19 You were asked about a valuation after receiving the repo of
20 fifty-two billion in connection with, I think, the loaning
21 marks and you said you thought there were many valuations. Do
22 you remember that?

23 A. Yes.

24 Q. Movants gave you a big book. Do you still have it?

25 A. I do.

1 Q. Can I ask you to turn to tab 78 of movants' book?

2 A. Sorry, yes.

3 Q. Okay, His Honor has that. This is an e-mail from Stephen
4 King to you on Sunday, September 21st in the evening, the
5 evening before the sale closed. You see that?

6 A. I do, yes.

7 Q. And he's saying to you, and he's copying Patrick, "Current
8 best estimate is the portfolio including seven billion cash is
9 48.5 to 49 billion." Do you see that?

10 A. Yes, I do.

11 Q. That's quite below fifty-two, isn't it?

12 A. Yes. This is my point about there's valuations swinging
13 all over the place.

14 Q. You were asked about your discussions Friday with Mr.
15 McDade.

16 A. Yes.

17 Q. And the representation to you from Mr. McDade or Mr. Kirk
18 as you were asking for more value -- and by the way, you were
19 asking for more value because you were concerned, were you not,
20 about the values of what you had received in the repo, what you
21 had not received in the repo and these illiquid securities that
22 you couldn't value at all?

23 A. Yes, as I had stated, well, I haven't really stated. The
24 night when the repo was actually being executed, there was a
25 massive shortfall in the delivery of what we were supposed to

1 get. So we got assets that weren't no the register that the
2 fed had been a party to, there were problems in delivering
3 assets, there were assets that were coming back to us that we
4 had already rejected in other transactions with JPMorgan. It
5 was a real nightmare and of course we had concerns around the
6 value, the environment, where market values were headed; we
7 were very concerned. And what, again, we wanted to make sure
8 we had the appropriate cushion to keep Barclays out of harm's
9 way.

10 Q. At some point Friday, when you were told by Mr. McDade or
11 Mr. Kirk that there were no more assets, there as nothing more,
12 did you take that to mean there were no more assets of the type
13 that you have said you were not willing to acquire, that --

14 MR. SCHILLER: Let me rephrase that.

15 Q. -- that there were no more assets of the kind that you
16 were willing to acquire, as opposed to the kinds of assets
17 Barclays was not willing to acquire, like the RACERS and other
18 kind of illiquid assets?

19 A. Yes. That was my understanding.

20 Q. You knew that Barclays had selected the assets it was
21 willing to acquire and that there were aspects of the entire
22 estate that Barclays was not interested in acquiring?

23 A. Yes, absolutely. I mean, that started the previous
24 weekend when we excluded a large chunk of assets related to
25 real estate and private equity and a lot of other illiquid

1 assets. Yes, a large set of assets we didn't want.

2 Q. Like Neuberger, for example?

3 A. Neuberger, yes.

4 Q. Let me know ask you to look again, Your Honor and Mr.
5 Ricci, to Trial Exhibit 580 that movants put in front of you.
6 And I don't know whether it was my friend Mr. Maguire and his
7 book or in the big book and I apologize for that.

8 THE COURT: 580 is tab 5 in Mr. Maguire's book.

9 MR. SCHILLER: Thank you, Judge.

10 Q. This is an e-mail, I believe you identified it, from Mr.
11 Clackson to you the day after closing, September 23rd. And Mr.
12 Maguire read to you the first part of the top e-mail from
13 Patrick: "1.9 billion was in, but Stephen has valued at nil,
14 so maybe upside." It goes on to say, "He has his guys working
15 on it." Do you see that?

16 A. Yes.

17 Q. And then Mr. Clackson explains what he's doing, what he is
18 valuing. "I am putting fifty cent value." Does that mean
19 fifty cents on the dollar, sir?

20 A. That's correct, yes. That's what it would imply.

21 Q. "I am putting fifty cents on the dollar on it for the
22 moment." So, to Mr. Clackson, working on his acquisition
23 balance sheet, this was not nil, was it?

24 A. No, that's correct.

25 Q. And this was not the final valuation either as he worked

1 on that process?

2 A. That's correct. There were various considerations.

3 Q. How long did it take Barclays, do you recall, to
4 definitively value the assets that it had received?

5 A. I don't believe we definitively valued all the assets
6 until February of 2009.

7 Q. Finally, you were asked by Mr. Maguire about margin. And
8 you were shown the APA in paragraph 1(d). And you indicated in
9 your testimony that you thought that you didn't go back to it.
10 But let me ask you whether you recall, and I'm going to try to
11 refresh you on this, it's not in your book, that that language
12 in the APA was replaced in the clarification letter? DO you
13 recall that?

14 A. Yes. Certain language within the APA was replaced, yes.

15 Q. That is the APA referred to exchange-traded derivatives?

16 A. Yes.

17 Q. And you told Mr. Maguire that you understood that included
18 margin, do you recall that?

19 A. Yes, I do.

20 Q. And then you said that later in the week it may have come
21 up again, you may have talked to your lawyer about it, but that
22 was the only memory. Do you recall whether in the
23 clarification letter, it was provided in the definition of
24 purchase assets -- and I'm not asking you to look at anything,
25 just see if this refreshes you, that exchange-traded

1 derivatives was coming to Barclays and any property that may be
2 held to secure obligations under such derivatives. Do you
3 recall that?

4 A. I do recall that, yes.

5 Q. And do you now recall that that clarification letter
6 language amended the APA?

7 A. Yes.

8 Q. And the clarification letter expressly makes clear that
9 exchange-traded derivatives include all margin and collateral,
10 doesn't it?

11 A. That's the -- yes, in the clarification letter, that's
12 correct.

13 Q. Thank you.

14 MR. SCHILLER: I have no -- I have two more questions.

15 THE COURT: The same thing happened to Mr. Shaw.

16 MR. SHAW: The old man privilege again, Your Honor.

17 THE COURT: Okay, it works. Works for me, too.

18 BY MR. SCHILLER:

19 Q. I can tell you a story -- I won't -- about the first time
20 we appeared in court together about twenty years ago. To your
21 knowledge, Mr. Clackson (sic), did anyone from Lehman or anyone
22 else ever suggest or say, prior to closing, that you were not
23 entitled to the 1.9 billion in Lehman's clearance boxes?

24 A. Sorry, just for the record, I'm Mr. Ricci, not Mr.
25 Clackson. And, no, not that I recall.

1 Q. Thank you. Thank you. You were also read some testimony,
2 Mr. Ricci, trial testimony from Harvey Miller and from Bart
3 McDade about the 769 million that was due in connection with
4 the 15c3 accounts. Do you recall that?

5 A. Yes, I do.

6 Q. And you mentioned that the clarification letter expressly
7 says that if you don't get the 769 million from the 15c3
8 account, you get it from somewhere else. DO you recall that
9 testimony?

10 A. Yes, id o.

11 Q. Did anyone ever suggest to you why this language was in
12 the letter, other than to make that Barclays was to get 769
13 million from one source, the accounts, or another?

14 A. I don't recall if there's a specific conversation about
15 why we had the language, but we did have the language that we
16 would get it from one source or another.

17 Q. Thank you.

18 MR. SCHILLER: Thank you, Your Honor.

19 THE COURT: Is there any redirect?

20 MR. GAFFEY: Not from the debtor, Your Honor.

21 MR. MAGUIRE: Just very briefly, Your Honor.

22 RECROSS-EXAMINATION

23 BY MR. MAGUIRE:

24 Q. Again, Bill Maguire for the SIPA trustee. Mr. Ricci, I
25 believe you just were asked some questions about language that

1 made its way into the clarification letter and that language
2 was, "any property that may be held to secure obligations under
3 exchange-traded derivatives."

4 A. Yes.

5 Q. Now did you see that language in the clarification letter
6 before the closing? Or is that something that you learned
7 about after the fact?

8 A. Before the closing, did you mean on Friday?

9 Q. No, before the closing on Monday morning the 22nd of
10 September?

11 A. I don't recall if I saw it before or afterwards. I
12 certainly would have read the letter, but I can't remember
13 specifically when I read it.

14 Q. Do you have any recollection of seeing that language,
15 specifically the language, "any property held to secure
16 obligations under exchange-traded derivatives"? Do you have a
17 recollection of ever seeing that language any time before the
18 closing on Monday morning?

19 A. I don't recall if I did or not, I'm sorry.

20 Q. Do you know whether you spoke with your lawyer concerning
21 that any time prior to the closing?

22 A. I believe I did speak to counsel around the issue of
23 exchange-traded derivatives, but I can't remember the details
24 around it.

25 Q. Was that before the closing?

1 **A. I think it was before the closing, but I can't be sure.**

2 MR. MAGUIRE: No further questions, Your Honor.

3 THE COURT: Does that prompt any questions?

4 MR. SCHILLER: No, Your Honor.

5 THE COURT: Mr. Ricci, you can go home.

6 THE WITNESS: Thank you. London's looking very good.

7 THE COURT: You're excused. Thank you for your time.

8 THE WITNESS: Thank you very much.

9 THE COURT: Now, there's still a couple of items of
10 unfinished business. One is, and this is really a question to
11 counsel. We had talked about using some time this evening if
12 we had the time, to just talk about what happens next and when
13 it happens and to have what amounts to a chambers conference,
14 but we would do it in place simply clearing the courtroom and
15 going off record.

16 My question is whether or not, given the intensity of
17 the last two weeks and the hour, you're comfortable doing that
18 now or if you would like me to schedule another time to discuss
19 when next we'll be able to come together for an agreed series
20 of trial days in June. I have some days, incidentally, that
21 I'm going to propose to you in addition to the ones that I
22 mentioned last time we were together.

23 Candidly, I think it would be useful if we could use
24 maybe ten or fifteen minutes for that purpose before breaking.
25 But I also recognize that people may have other priorities for

1 the moment. Is it okay to stay? Okay?

2 MR. SCHILLER: Absolutely, Your Honor.

3 THE COURT: Fine. Let's do that then. I also wanted
4 to rule on the discovery motion relating to Exhibits 701 and
5 705. They're admitted.

6 (Movants' Exhibits 701 and 705 are hereby received into
7 evidence as of this date.)

8 I have reviewed the May 5 letter brief from Boies
9 Schiller and the May 6 -- excuse me, May 4 memorandum submitted
10 by the movants. I probably tipped my hand during colloquy as
11 well. I don't believe that the Exhibits 701 and 705 truly fall
12 within the ambit of Rule 408 because the dispute there being
13 discussed by e-mail communication between Barclays and the fed
14 was settled is not the dispute which is before the Court and
15 the issues presented do not really fall within either section
16 of 408(a).

17 I'm also influenced by the opinion of the second
18 circuit in Starter Corp. v. Converse, Inc. 170 F. 3d 286 at
19 293, a 1999 second circuit decision which provide in the second
20 circuit, "evidence of a settlement agreement and its
21 surrounding circumstances though otherwise barred by Rule 408
22 can fall outside the rule if it is offered for another purpose
23 i.e. for a purpose other than to prove or disprove the validity
24 of the claims that the agreement was meant to settle."

25 There's some other authority as well, but I don't need

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1 to burden the record with more authority. Under the
2 circumstances, those documents are in for whatever weight
3 they're to be given.

4 Now, we're adjourned for the week and we'll have a
5 chamber conference in about ten minutes to discuss when next we
6 get together.

7 (Whereupon these proceedings were concluded at 5:39 p.m.)

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4 T E S T I M O N Y

	WITNESS	EXAM BY	PAGE	LINE
6	Saul Burian	Mr. Boies	6	6
7	Saul Burian	Mr. Kirpalani	116	18
8	Saul Burian	Mr. Boies	121	13
9	Rich Ricci	Mr. Gaffey	124	15
10	Rich Ricci	Mr. Maguire	218	2
11	Rich Ricci	Mr. Schiller	246	23
12	Rich Ricci	Mr. Maguire	260	23

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15 E X H I B I T S

	NO.	DESCRIPTION	ID.	EVID.
17	M-701			263
18	M-705			263

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2 C E R T I F I C A T I O N

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4 I, Lisa Bar-Leib, certify that the foregoing transcript is a
5 true and accurate record of the proceedings.

6

7

8 LISA BAR-LEIB

9 AAERT Certified Electronic Transcriber (CET**D-486)

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16 Date: May 11, 2010

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